

(27,342)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 587.

WILLIAM BREIHOLZ, EDWARD KORF, JOSEPH STUART,
ET AL., PLAINTIFFS IN ERROR,

vs.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY,
IOWA, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

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1 In the Supreme Court of Iowa, May Term, A. D. 1918.

In Equity. Causes No. 4130 and 4152.

WILLIAM BREIHOLZ, EDWARD KORF, JOSEPH STUART, MARY DOYLE,
Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan,
Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duits-
man, J. M. De Vaul, Appellants,

vs.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA, W. P.
Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klien,
Members of the Board of Supervisors of Pocahontas County, Iowa;
L. O'Donnell, as Auditor of Pocahontas County; John Forbes,
County Treasurer of Pocahontas County, Iowa; S. F. Hiatt, and
the Katz-Craig Contracting Company, Drainage District No. 29,
Pocahontas County, Iowa, Appellees.

Appeal from the District Court of Pocahontas County, Iowa.

Hon. D. F. Coyle, Judge.

T. F. Lynch, of Pocahontas, Iowa, and Kenyon, Kelleher, Price
& Hanson, of Fort Dodge, Iowa, Attorneys for Appellants.

F. C. Gilchrist, of Laurens, Iowa, and Robert Healy, of Fort
Dodge, Iowa, Attorneys for Appellees.

Appellants' Abstract of the Record.

2 Due, legal and timely service of the within abstract of the
Record is hereby accepted and we acknowledge the receipt
of two copies thereof and we also acknowledge service of notice of
oral argument.

Dated at Pocahontas, Iowa, this — day of April, 1918.

_____,
_____,
Attorneys for Appellees.

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Pleadings.

On the second day of October, 1913, the Plaintiffs, William Brei-
holz, et al., filed their petition in the office of the Clerk of the Dis-
trict Court of Pocahontas County, Iowa, against the Defendants
Board of Supervisors of Pocahontas County, Iowa, and on the first
day of December, 1913, the said Plaintiffs filed another petition
against the said Defendants; both petitions being similar in form
and the petition filed on the first of December, 1913, is as follows:

Petition.

The Plaintiffs for cause of action against the Defendants, state:

Par. 1. That the Plaintiffs are each the owners of certain described lands in Pocahontas County, Iowa, included in what is known as Drainage District No. 29, in said county,

Par. 2. That they have a common though not an equal interest in the relief hereinafter prayed for and in their behalf.

Par. 3. That the Defendants W. P. Hopkins, W. C. Lieb, C. Nolan, M. J. Dooley, and R. Klien are members of the Board of Supervisors of Pocahontas County, Iowa.

Par. 4. That the Defendant L. O'Donnell is the County Auditor of Pocahontas County, Iowa.

Par. 5. That the Defendant John Forbes is the County Treasurer of Pocahontas County, Iowa.

Par. 6. That the Defendant S. F. Hiatt is a drainage contractor of Pocahontas County, Iowa.

Par. 7. That the Defendant the Katz-Craig Contracting
4 or Construction Company is a contracting company of Omaha, Nebraska, and is engaged in the construction of drainage ditches in Pocahontas County, Iowa, and in other counties in the State of Iowa.

Par. 8. That on or about the 24th of October, 1907, there was established and organized, by the Board of Supervisors in Pocahontas County, Iowa, a drainage district known and numbered as Drainage District No. 29, Pocahontas County, Iowa.

Par. 9. That the improvements contemplated in the organization of said Drainage District No. 29, and the improvements that were afterwards ordered and constructed in said district, consisted of open drains and ditches known in part as Main Ditch, "Branch A" and also tile drains one of which known of in part as "Branch B" affected in some measure the lands of these plaintiffs.

Par. 10. That on or about the 8th day of April, 1908, the Board of Supervisors of Pocahontas County, Iowa, made and entered into a certain contract with the defendants, the Katz-Craig Contracting Company, for the construction of certain of the improvements in said drainage district for the consideration of \$31,525.00.

Par. 11. That on or about the 31st day of January, 1910, the said Katz-Craig Contracting Company by a written proposal, filed with the Board of Supervisors of Pocahontas County, offered to the said Board to modify and change the terms of their contract previously made with the board as above stated, and to complete only a part of said ditch for an agreed compensation of \$4,425.00 and to cancel the remainder of their contract with the Board of Supervisors,

5 said \$4,425.00 when paid to the said Katz-Craig Company to be payment in full of all claims which the said Katz-Craig Company would have, demand or be entitled to under their contract with the said Board of Supervisors, for all work done in constructing drainage district No. 29.

Par. 12. That on or about the 11th day of February, 1910, the said Board of Supervisors by resolution duly made and entered of record, accepted the proposition of the Katz-Craig Company and thereby and on account of which when the said company completed their contract then under the new agreement they would be entitled in full payment for all the work that they did under their contract in district No. 29, a total sum of \$4425.00.

Par. 13. That the engineer in charge of the construction of the improvement in said drainage district issued monthly estimates to the Katz-Craig Constructing Company for \$4415.00 and no more, which was in full payment of all work of any kind or description that said contracting company had done or performed under their contract in drainage district No. 29.

Par. 14. That upon said estimates the County Auditor of Pocahontas County, Iowa, issued to the said Katz-Craig Constructing Company warrants against the drainage funds in drainage district No. 29 upon the county Treasurer of said County for the sum of \$3,532.01 prior to the 7th day of July, 1910.

6 Par. 15. That on the 7th day of July, 1910, the Board of Supervisors of Pocahontas County, Iowa, made and entered a resolution directing J. A. Terry the then County Auditor of Pocahontas County, Iowa, to issue to the Katz-Craig Constructing Company a warrant against the drainage funds in said drainage district No. 29, in the sum of \$2675.83 and that on or about the 30th day of July, 1910, the said County Auditor issued to the Katz-Craig Constructing Company a warrant upon the County Treasurer of said County and against the funds in said drainage district for the sum of \$2675.83.

Par. 16. That said warrant thus issued being warrant No. — constituted an overpayment to the Katz-Craig Constructing Company of the sum of approximately \$1782.84 more than was due the said Katz-Craig Constructing Company under its said contract in said drainage district. That the engineer in charge of the construction of said improvement never filed with the county Auditor of Pocahontas County, Iowa, an estimate of said payment.

Par. 17. That said resolution of the Board of Supervisors so entered on the 7th day of July, 1910, and the said warrant for \$2675.83 so issued to the Katz-Craig Constructing Company on July 30th, 1910, was made, entered, done, and issued through inadvertence, mistake, and oversight upon the part of the Board of Supervisors and the County Auditor of Pocahontas County, Iowa, and the funds of said district in which these Plaintiffs are interested have been depleted and diminished in said amount.

Par. 18. That the said Katz-Craig Constructing Company has received from the County Treasurer of Pocahontas County, out of the funds of said Drainage District No. 29 the full amounts of all warrants issued to it, amounting to the sum of \$6207.84 and interest thereon and including the overpayment of \$1782.84 and interest thereon.

Par. 19. Plaintiffs further allege and state the fact to be that the resolution adopted by the said Board of Supervisors on the 7th day of July, 1910, was erroneous and illegal; that the sum of \$2,675.83 found by this resolution to be due said contractors in mistake and error and in truth and in fact there was only the sum of \$883.02 due the said contractors at said time and that said mistake these Plaintiffs allege had wronged them as well as others in the district and has reduced and depleted and lessened the drainage fund of said district in the amount of \$1,782.84 with interest at 6% from July 30, 1910.

Par. 20. That on or about the — day of —, in the year of —, the Board of Supervisors of Pocahontas County by a resolution entered of record confirmed and levied an assessment against all the lands in drainage district No. 29 to pay for the construction of the ditches and drains in said district and that the lands of these appellants were assessed the amount hereinafter set out on said assessment.

Par. 21. That on or about the 8th day of June, 1911, the Board of Supervisors of Pocahontas County by a resolution entered of record ordered and authorized certain repairs and changes of the ditches constructed in said drainage district No. 29.

Par. 22. That under the guise of said resolution the Board of Supervisors on or about the 9th day of June, 1911, entered into a written contract with the defendant S. F. Hiatt whereby the said S. F. Hiatt agreed to deepen, clean, reopen and repair certain parts of said Drainage District No. 29 and the said Board of Supervisors agreed to pay to the said S. F. Hiatt a large sum of money, to wit, approximately about \$11,000.00.

Par. 23. Plaintiffs further allege and state the fact to be on information and belief, that neither these plaintiffs nor any of the other landowners interested in the improvement in said Drainage District No. 29, were ever notified or had any knowledge of said action of the Board of Supervisors in entering said resolution and making said contract with the said S. F. Hiatt. Nor were these Plaintiffs or any of the other persons interested in said Drainage Improvement ever given an opportunity to be heard before the Board of Supervisors upon the matter involved in the said resolution and the said contract with S. F. Hiatt.

Par. 24. That no notice was ever given inviting contractors to bid on the improvement to be made or work to be done under the said resolution made and entered on the 8th day of June, 1911, and the said contract was not let to the lowest responsible bidder as required by law but was in truth and in fact awarded to and entered

into with the said S. F. Hiatt without any notice, without any opportunity for the said landowners interested to be heard, without any notice to them of any proposed cleanouts, repairs, or changing of the improvements, ditches, and drains in Drainage Improvement District No. 29 and without the parties interested and that would be required to pay for the same, being given an opportunity to be heard on the necessity and advisability of any changes to be made, and that said contract thus made and entered into with the Defendant S. F. Hiatt was for an exorbitant and unreasonable amount and rate of compensation and is therefore illegal and void as is also all the acts and doings of said Board of Supervisors in regard to said matter.

Par. 25. That under the authority of said resolution of June 8th, 1911, and the said contract of June 9th, 1911, with S. F. Hiatt, certain of the ditches and drains in said Drainage District were greatly enlarged and changed by deepening and widening and enlarging the same beyond the original plans and specifications and that these Plaintiffs had no notice or knowledge thereof until after the construction of the same.

Par. 26. Plaintiffs further allege and state the fact to be that they are informed and believe that the following warrants have been issued by the County Auditor of Pocahontas County, Iowa, to the said Defendant S. F. Hiatt in payment of said work under said illegal contract of June 8th, 1911.

Warrant No. 3038, August 23, 1911.....	\$1,632.24
“ No. 3261, Dec. 6, 1911.....	2,464.00
“ No. 3740, June 20, 1912.....	4,334.18
“ No. 3741, June 20, 1912.....	2,167.60

That said warrants were illegally issued by said County Auditor and were without authority of law to pay for said work done under said illegal contract; and that Plaintiffs are informed and believe that said warrants have been wrongfully presented to the Defendant John Forbes, County Treasurer of Pocahontas County, for payment and some have been paid and others will be unless the defendants are restrained and enjoined from so doing.

Par. 27. Plaintiffs allege and state the fact to be that on or about the 8th day of Nov., 1911, the Board of Supervisors by a resolution entered of record made an apportionment of the costs of construction, fees and damages, for the construction of the improvements in said drainage district and levied the same against the lands in said district including the plaintiff's lands against which an assessment was levied as follows:

10 William Breiholz.	
NW $\frac{1}{4}$ of SW $\frac{1}{4}$ 21-90-33.....	\$103.74
SW $\frac{1}{4}$ of SW $\frac{1}{4}$ 21-90-33.....	49.14
NE $\frac{1}{4}$ of SE $\frac{1}{4}$ 20-90-33.....	958.23
NW $\frac{1}{4}$ of SW $\frac{1}{4}$ 20-90-33.....	327.60
N 10 acres SW $\frac{1}{4}$ of SE $\frac{1}{4}$ 20-90-33.....	81.90
N 10 acres SE $\frac{1}{4}$ of SE $\frac{1}{4}$ 20-90-33.....	382.20

Edward Korf.

SW $\frac{1}{4}$ of NW $\frac{1}{4}$ 20-90-33.....	\$363.48
SE $\frac{1}{4}$ of NW $\frac{1}{4}$ 20-90-33.....	775.20

Mary Doyle.

SW $\frac{1}{4}$ of NW $\frac{1}{4}$ 20-90-33.....	\$200.22
SE $\frac{1}{4}$ of SW $\frac{1}{4}$ 20-90-33.....	432.25

J. W. Clancey.

SW $\frac{1}{4}$ of SW $\frac{1}{4}$ 16-90-33.....	\$829.92
SE $\frac{1}{4}$ of SW $\frac{1}{4}$ 16-90-33.....	1,490.58
NE $\frac{1}{4}$ of NW $\frac{1}{4}$ 21-90-33.....	556.92
NW $\frac{1}{4}$ of NW $\frac{1}{4}$ 21-90-33.....	311.22
SW $\frac{1}{4}$ of NW $\frac{1}{4}$ 21-90-33.....	185.64
SE $\frac{1}{4}$ of NW $\frac{1}{4}$ 21-90-33.....	81.90

Charles F. Linnan.

NE $\frac{1}{4}$ of NE $\frac{1}{4}$ 17-90-33.....	\$262.82
NW $\frac{1}{4}$ of NE $\frac{1}{4}$ 17-90-33.....	827.63
SW $\frac{1}{4}$ of NE $\frac{1}{4}$ 17-90-33.....	170.40
SE $\frac{1}{4}$ of NE $\frac{1}{4}$ 17-90-33.....	166.14
NE $\frac{1}{4}$ of SE $\frac{1}{4}$ 17-90-33.....	166.14
NW $\frac{1}{4}$ of SE $\frac{1}{4}$ 17-90-33.....	170.40
SW $\frac{1}{4}$ of SE $\frac{1}{4}$ 17-90-33.....	199.53
SE $\frac{1}{4}$ of SE $\frac{1}{4}$ 17-90-33.....	502.56

11 John E. Jordan.

NW $\frac{1}{4}$ of SE $\frac{1}{4}$ 30-90-33.....	\$873.60
SW $\frac{1}{4}$ of SE $\frac{1}{4}$ 30-90-33.....	933.66

Alex Peterson.

NE $\frac{1}{4}$ of SW $\frac{1}{4}$ 4-90-33.....	\$11.82
NW $\frac{1}{4}$ of SW $\frac{1}{4}$ 4-90-33.....	360.98
SW $\frac{1}{4}$ of SW $\frac{1}{4}$ 4-90-33.....	349.16
SE $\frac{1}{4}$ of SW $\frac{1}{4}$ 4-90-33.....	11.82
SE $\frac{1}{4}$ of NW $\frac{1}{4}$ 9-90-33.....	118.20
NE $\frac{1}{4}$ of SW $\frac{1}{4}$ 16-90-33.....	262.08
NW $\frac{1}{4}$ of SW $\frac{1}{4}$ 16-90-33.....	385.92
NW $\frac{1}{4}$ of SE $\frac{1}{4}$ 16-90-33.....	81.90
SW $\frac{1}{4}$ of SE $\frac{1}{4}$ 16-90-33.....	477.75
SE $\frac{1}{4}$ of SE $\frac{1}{4}$ 16-90-33.....	16.38

Par. 28. That said assessment was not paid by these Plaintiffs but the same went to bond and as Plaintiffs are informed and believed the same now draws interest at the rate of 6% per annum payable when the ordinary taxes are payable twice a year, to wit, in March

and in September of each year. That these Plaintiffs have been ready, able and willing and have offered to pay said interest on said assessments as required by law but that the County Treasurer of this county has refused to accept the same and still refuses although repeatedly having been requested to accept same and having been tendered the same, and these plaintiffs now tender and offer to pay the interest on said above described assessments and still offer to pay the same with the accrued interest on the same but the County Treasurer refuses to accept and has offered the lands of the Plaintiffs, as above described, for sale at tax sale and will sell the same unless enjoined and restrained from so doing.

Par. 29. That on or about the 4th day of Dec., 1912, the said defendant Board of Supervisors of Pocahontas County, Iowa, passed a resolution and entered the same of record making a levy for special and drainage taxes for the year 1912 in Drainage District No. 29 of \$682.00 to pay interest on bonds and \$11,500.00 to pay outstanding indebtedness.

Par 30. That in making the tax list for the year of 1912, the County Auditor of Pocahontas County, Iowa, entered thereon against the District situated in Drainage District No. 29 a special assessment amounting to \$12,634.03 of which amount the following amounts were entered against the lands of these plaintiffs, as above described, in the following amounts, to-wit:

William Brieholz.

NW $\frac{1}{4}$ of SW $\frac{1}{4}$ 21-90-33.....	\$19.85
SW $\frac{1}{4}$ of SW $\frac{1}{4}$ 21-90-33.....	9.39
NE $\frac{1}{4}$ of SE $\frac{1}{4}$ 20-90-33.....	188.85
NW $\frac{1}{4}$ of SE $\frac{1}{4}$ 20-90-33.....	62.75
N. 10 acres SW $\frac{1}{4}$ of SE $\frac{1}{4}$ 20-90-33.....	15.56
N. 10 acres SE $\frac{1}{4}$ of SE $\frac{1}{4}$ 20-90-33.....	73.21

Joseph Stuart.

NE $\frac{1}{4}$ of SE $\frac{1}{4}$ 19-90-33.....	\$98.93
NW $\frac{1}{4}$ of SE $\frac{1}{4}$ 19-90-33.....	88.46
SW $\frac{1}{4}$ of SE $\frac{1}{4}$ 19-90-33.....	53.15
SE $\frac{1}{4}$ of SE $\frac{1}{4}$ 19-90-33.....	51.85

Edward Korf.

NE $\frac{1}{4}$ of NE $\frac{1}{4}$ 20-90-33.....	\$95.54
SW $\frac{1}{4}$ of NE $\frac{1}{4}$ 20-90-33.....	52.50
13 SW $\frac{1}{4}$ of NW $\frac{1}{4}$ 20-90-33.....	69.61
SE $\frac{1}{4}$ of NW $\frac{1}{4}$ 20-90-33.....	148.51
SE $\frac{1}{4}$ of NE $\frac{1}{4}$ 20-90-33.....	101.97

Mary Doyle.

S. Pt. SW $\frac{1}{4}$ of SE $\frac{1}{4}$ 20-90-33.....	\$79.00
SW $\frac{1}{4}$ of SW $\frac{1}{4}$ 20-90-33.....	38.31
SE $\frac{1}{4}$ of SW $\frac{1}{4}$ 20-90-33.....	82.80
S. Pt. SE $\frac{1}{4}$ of SE $\frac{1}{4}$ 20-90-33.....	50.28

Charles F. Linnan.

NE $\frac{1}{4}$ of NE $\frac{1}{4}$ 17-90-33.....	\$50.25
NW $\frac{1}{4}$ of NE $\frac{1}{4}$ 17-90-33.....	158.53
SW $\frac{1}{4}$ of NE $\frac{1}{4}$ 17-90-33.....	32.62
SE $\frac{1}{4}$ of NE $\frac{1}{4}$ 17-90-33.....	31.77
NE $\frac{1}{4}$ of SE $\frac{1}{4}$ 17-90-33.....	31.77
NW $\frac{1}{4}$ of SE $\frac{1}{4}$ 17-90-33.....	32.68
SW $\frac{1}{4}$ of SE $\frac{1}{4}$ 17-90-33.....	35.20
SE $\frac{1}{4}$ of SE $\frac{1}{4}$ 17-90-33.....	96.26

John E. Jordan.

NW $\frac{1}{4}$ of SE $\frac{1}{4}$ 30-90-33.....	\$167.35
SW $\frac{1}{4}$ of SE $\frac{1}{4}$ 30-90-33.....	178.86

Alex Peterson.

NE $\frac{1}{4}$ of SW $\frac{1}{4}$ 4-90-33.....	\$2.23
NW $\frac{1}{4}$ of SW $\frac{1}{4}$ 4-90-33.....	69.15
SW $\frac{1}{4}$ of SW $\frac{1}{4}$ 4-90-33.....	66.86
SE $\frac{1}{4}$ of SW $\frac{1}{4}$ 4-90-33.....	2.23
SE $\frac{1}{4}$ of NW $\frac{1}{4}$ 9-90-33.....	22.62
NE $\frac{1}{4}$ of SW $\frac{1}{4}$ 16-90-33.....	50.18
NW $\frac{1}{4}$ of SW $\frac{1}{4}$ 16-90-33.....	73.91
NW of SE $\frac{1}{4}$ 16-90-33.....	15.66
SW $\frac{1}{4}$ of SE $\frac{1}{4}$ 16-90-33.....	91.51
SE $\frac{1}{4}$ of SE $\frac{1}{4}$ 16-90-33.....	3.08

14 J. W. Clancey.

SW $\frac{1}{4}$ of SW $\frac{1}{4}$ 16-90-33.....	\$159.06
SE $\frac{1}{4}$ of SW $\frac{1}{4}$ 16-90-33.....	285.57
NE $\frac{1}{4}$ of NW $\frac{1}{4}$ 21-90-33.....	106.68
NW $\frac{1}{4}$ of NW $\frac{1}{4}$ 21-90-33.....	59.60
SW $\frac{1}{4}$ of NW $\frac{1}{4}$ 21-90-33.....	35.54
SE $\frac{1}{4}$ of NW $\frac{1}{4}$ 21-90-33.....	15.66

Henry Smith.

NE $\frac{1}{4}$ of SW $\frac{1}{4}$ 19-90-33.....	\$66.56
NW $\frac{1}{4}$ of SW $\frac{1}{4}$ 19-90-33.....	2.05
SW $\frac{1}{4}$ of SW $\frac{1}{4}$ 19-90-33.....	14.90
SE $\frac{1}{4}$ of SW $\frac{1}{4}$ 19-90-33.....	53.15

P. S. Peiffer.

NE $\frac{1}{4}$ of NE $\frac{1}{4}$ 30-90-33.....	\$40.93
SE $\frac{1}{4}$ of NE $\frac{1}{4}$ 30-90-33.....	119.55
NE $\frac{1}{4}$ of SE $\frac{1}{4}$ 30-90-33.....	54.60

Fred Duitsman.

NE $\frac{1}{4}$ of SW $\frac{1}{4}$ 30-90-33.....	\$41.70
NW $\frac{1}{4}$ of SW $\frac{1}{4}$ 30-90-33.....	37.42
SW $\frac{1}{4}$ of SW $\frac{1}{4}$ 30-90-33.....	45.07
SE $\frac{1}{4}$ of SW $\frac{1}{4}$ 30-90-33.....	90.40

Garlies Tweedale.

Lot 3 section 31-90-33.....	\$73.27
Lot 4 " 31-90-33.....	62.40

J. M. De Vault.

SW $\frac{1}{4}$ of SE $\frac{1}{4}$ 18-90-33.....	\$25.90
SE $\frac{1}{4}$ of SE $\frac{1}{4}$ 18-90-33.....	26.60

15 Par. 31. That the amounts so entered by the County Auditor on the 1912 tax lists exceed the amount ordered by the Board of Supervisors in the sum of \$452.03.

Par. 32. Plaintiffs further allege and state the fact to be that the County Auditor in making up his tax lists for the year 1912, and in certifying the same to the County Treasurer of Pocahontas County, failed and neglected to specify the amount of the interest on the unpaid assessments that these Plaintiffs and Appellants should pay and also failed to specify separately the amount of said special assessment thus levied to pay for the alleged work done under the illegal contract with the Defendant S. F. Hiatt, as above alleged and these Plaintiffs and Appellants are unable to accurately estimate except in a general way, the amount of interest on the unpaid assessments, which they are ready, able, and willing and have at all times been willing to pay to the County Treasurer of Pocahontas County but to their best knowledge, and belief they should pay as interest on the unpaid assessment as found in the taxes of the year 1912, the following amounts:

Charles F. Linnan	\$147.93
Mary Doyle	37.95
John E. Jordan	108.43
J. W. Clancey	207.40
Alex Peterson	124.56
William Breiholz	114.16
Edward Korf	100.25

and they tender and offer the same in open court and have heretofore offered to pay the same to the County Treasurer of Pocahontas

- County, and he has refused to accept the same and now threatens to sell the lands of these Plaintiffs and Appellants at tax sale and will do so unless restrained.

Par. 33. Plaintiffs and Appellants further state that said levy of \$12,182. in Drainage District No. 29 on Dec. 4th, 1912, was made for the purpose of levying interest at the rate of 6% per annum upon the unpaid assessments then outstanding in said district and to produce a fund with which to pay the said Defendant S. F. Hiatt the amount agreed to be paid him under his said illegal, void, and unauthorized contract as above alleged and to provide for the deficiency of the funds that have been depleted and reduced in said Drainage District by the over-payment to the Defendant the Katz-Craig Constructing Company as above alleged, the sum of \$1,782.84.

Par. 34. Plaintiffs further allege that said assessment and levy made by said Board of Supervisors on Dec. 4th, 1912, was arbitrarily and illegally made by said Board without the aid of any commission as required by law, without taking into consideration the value of the improvements made or contemplated to be made under the illegal contract with Defendant S. F. Hiatt; without taking into consideration what, if any, benefits the Plaintiffs' lands would derive from the changing, reopening, repairing, and deepening of the ditches draining in Drainage District No. 29 and said assessment as thus made is illegal, void, excessive, and unjust.

Par. 35. Plaintiffs further allege and state the fact to be that the excavations made by the said S. F. Hiatt under his contract were made in ditches which do not in fact affect the Plaintiffs' lands and in which said lands do not depend for drainage or outlet: That plaintiffs' lands receive no benefit whatever from the excavations and improvements made by the said S. F. Hiatt in the main drain nor in Branch A; that no notice of hearing upon said proposed special assessment was given these Plaintiffs or any of the other persons interested in said Drainage District; that no hearing was had before the Board of Supervisors upon said proposed levy of \$11,500.00 on Dec. 4th, 1912, and these Plaintiffs had no notice or knowledge thereof or the intention of the Board of Supervisors to make the same until long after the same had been made and spread upon the tax lists of said County.

Par. 36. Plaintiffs allege that said assessment thus made and levied on Dec. 4th, 1912, against their lands is illegal and void for all of the reasons above alleged and also for the following reasons:

(a) That the Board of Supervisors of Pocahontas County had no authority nor did they have jurisdiction to make said assessment and to levy the same as was done, against said lands in said district and especially the lands of these Plaintiffs and Appellants as above described.

(b) That said assessments were not levied or apportioned according to the benefits if any, that were derived by the lands of plaintiffs from said Improvement.

(c) That said assessment and levy made by the Board of Supervisors on Dec. 4th, 1912, was made contrary to the provisions of the Constitution of the United States and of the State of Iowa, and of statutes in such cases made and provided and is therefore levying an illegal tax on assessment against Plaintiffs' lands and is therefore contrary to law.

18 (d) That the same was levied and assessed on an erroneous and illegal and unjust method of classification and apportionment.

(e) That the same was levied and assessed to provide funds to pay for work alleged to have been done or to be done under an illegal and void contract and without authority of law.

(f) That the alleged work done under said contract with the said S. F. Hiatt Defendant was done for the betterment of lands other than the lands of the Plaintiffs and was done for their benefit and not for the benefit and not for the benefit of Plaintiffs' lands and therefore said taxes and assessment is illegal and void.

(g) That no public benefit, use, or utility was served or promoted by the work done under said illegal contract thus made with the said S. F. Hiatt but that said work was done for private parties for private purposes and therefore those benefited thereby should pay for the same and that the levying of the said taxes and assessments against the lands of the Plaintiffs is an attempt under the law to deprive unjustly said Plaintiffs of their property without due process of law, contrary to the Constitution of the United States and of the State of Iowa, and is therefore illegal and void.

Par. 37. That Plaintiffs have refused and still refuse to pay the amount entered upon the 1912 tax lists against the lands as above set out except that they are willing and hereby tender and offer to pay the amounts that may be determined against their lands as justly due as interest as required by law on the unpaid assessments that were levied by the Board of Supervisors of Pocahontas County on or about the 8th day of Nov., 1911.

19 Par. 38. That the said County Treasurer, John Forbes, of Pocahontas County is proceeding to advertise the lands of these Plaintiffs for sale at the regular tax sale to be held on the 1st Monday in December, 1913, for the purpose of enforcing payment of amount so entered against their lands, and unless restrained by an order of this Court will sell Plaintiffs said lands at said sale.

19 Par. 39. That the Plaintiffs have no plain, speedy, or adequate remedy at law and unless a temporary restraining order is issued by this Court to prevent the sale of their said lands by the said John Forbes, the County Treasurer of Pocahontas County, Iowa, these Plaintiffs will suffer an irreparable injury and loss.

Wherefore, Plaintiffs pray that this Court issue a temporary order of injunction restraining the said John Forbes, County Treasurer from selling their lands as above described and upon the final hear-

ing of this cause the said temporary injunction be made permanent and forever restraining the County Treasurer of Pocahontas County from selling said lands as above described for the purpose of enforcing the payment of said alleged special assessment and that this Court decree that the action of the Board of Supervisors and the County Auditor of Pocahontas County in making the contract with the said S. F. Hiatt on June 9th, 1911, was void and said contract itself is void and of no force and effect in law and that the attempt to levy a special assessment against the lands of these Plaintiffs by the Board of Supervisors of Pocahontas County, Iowa, under and by virtue of the resolution of Dec. 4th, 1912, is unlawful and void and that the said S. F. Hiatt repay into the drainage fund of District No. 29 in the office of the County Treasurer of Pocahontas County, Iowa, the said sum of \$10,538.02 and that he be required to surrender for cancellation and the County Auditor of Pocahontas County, Iowa, be required to cancel the unpaid amount of the warrants so issued to the said S. F. Hiatt for \$8,905.78 and repay into the drainage fund in the office of the County Treasurer said sum of \$1,632.04 with interest thereon at 6% per annum from date of payment and that the Katz-Craig Contracting Company be required to repay into the drainage fund in Drainage District No. 29, in the office of the County Treasurer of Pocahontas County, Iowa, the said sum of \$1,782.84 with interest thereon at the rate of 6% per annum from the 30th day of July, 1910, and that the County Treasurer of Pocahontas County, be restrained from collecting, attempting to collect, or enforcing collection of said alleged special assessment thus levied by the Board of Supervisors of Dec. 4, 1912, and that the said County Treasurer of Pocahontas County, Iowa, be further restrained from paying to the said S. F. Hiatt, Defendant, any further amounts of money on any warrants issued to the said Defendant, S. F. Hiatt, by virtue of or under authority of the said illegal contract made and entered into by the Board of Supervisors and County Auditor of Pocahontas County, Iowa, under date of June 9th, 1911, and for such other full, complete, entire, and equitable relief as equity can give and for the costs of this action.

T. F. LYNCH,
Attorney for Plaintiff.

STATE OF IOWA,
Pocahontas County, ss:

I, J. W. Clancey, and Alex Peterson, being duly sworn on oath do say that I am one of the Plaintiffs named in the above entitled cause of action and who signed the above petition; that I signed the same for myself and for the other Plaintiffs interested with me in said cause of action; that I have read the above petition, know the contents thereof and that the facts and things as therein stated are true as I verily believe.

J. W. CLANCEY,
ALEX PETERSON.

Subscribed in my presence and sworn to before me by the said J. W. Clancey and Alex Peterson this 25th day of November, 1913.

T. F. LYNCH,
Notary Public in and for Said County.

That on the 26th day of November, 1913, the following order allowing temporary injunction was issued:

Order Allowing Temporary Injunction.

Now, to wit, on this 26th day of November, 1913, upon reading the within petition, hearing the evidence offered in support thereof it is hereby ordered that a writ of injunction issue as therein prayed for restraining the Defendant John Forbes as County Treasurer of Pocahontas County, Iowa, from enforcing the collection of the alleged special assessments against the lands of the Plaintiffs as herein described and in the following amounts, to wit:

Alex Peterson SW $\frac{1}{4}$ of 4-90-33, \$70.23.
 Alex Peterson, E $\frac{1}{2}$ of NW $\frac{1}{4}$, 9-90-33, \$11.31.
 Alex Peterson, W $\frac{1}{2}$ of NE $\frac{1}{4}$ and SE $\frac{1}{4}$ and N $\frac{1}{2}$ of SW $\frac{1}{4}$, 16-90-33, \$117.17.
 J. W. Clancey, S $\frac{1}{2}$ of SW $\frac{1}{4}$ of 16-90-33, \$444.63.
 C. F. Linnan, E $\frac{1}{2}$ of 17-90-33, \$469.02.
 Edward Korf, S $\frac{1}{2}$ of the NW $\frac{1}{4}$ of 20-90-33, E $\frac{1}{2}$ of NE $\frac{1}{4}$ and SW NE 20-90-33, \$510.48.

22 J. M. DeVaul, S $\frac{1}{2}$ of SE $\frac{1}{4}$ 18-90-33, \$52.50.
 William Breiholz, N $\frac{1}{2}$ of SE $\frac{1}{4}$ of 20-90-33 and W $\frac{1}{2}$ of SW $\frac{1}{4}$ of 21-90-33, and N 10 acres of SW $\frac{1}{4}$ of SE $\frac{1}{4}$ of 20-90-33, and N 10 acres of SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of 20-90-33, \$340.47.
 Mary Doyle S $\frac{1}{2}$ of SW $\frac{1}{4}$ of 20-90-33, \$121.11, S $\frac{3}{4}$ S $\frac{1}{2}$ of SE $\frac{1}{4}$ of 20-90-33, \$129.28.

J. W. Clancey, NW $\frac{1}{4}$ of 21-90-33, \$217.48.
 P. S. Peiffer E $\frac{1}{2}$ of NE $\frac{1}{4}$ and NE $\frac{1}{4}$ of SE $\frac{1}{4}$ 30-90-33, \$215.08.
 John E. Jordan, W $\frac{1}{2}$ of SE $\frac{1}{4}$, 30-90-33, \$346.21.
 Fred Duitsman, SW $\frac{1}{4}$ 30-90-33, \$107.29.
 Garlies Tweedale, Lots 3 and 4, Section 31-90-33, \$135.67.
 Also interest and costs on the above taxes.

Upon the filing of a bond in the office of the Clerk of the District Court of Iowa, in and for Pocahontas County conditioned as required by law, in the penal sum of \$1,000.00, with sureties to be approved by the Clerk of the District Court, said injunction when issued shall restrain the said John Forbes as County Treasurer of Pocahontas County, Iowa, from enforcing the above taxes and special assessments against the lands above described of these Plaintiffs.

D. F. COYLE,

Judge of the 14th Judicial District.

On the 1st day of December, 1913, the following writ of injunction in said cause was issued:

23 *Writ of Injunction.*

STATE OF IOWA,
Pocahontas County, ss:

To John Forbes, Defendant:

Whereas: William Breiholz, Edward Korf, Joseph Stuart, Mary Doyle, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan,

Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitsman, and J. M. DeVaul, as Plaintiffs has this day filed in the office of the Clerk of the District Court of the State of Iowa, in and for Pocahontas County, a petition duly sworn to, making John Forbes and others, Defendants therein, and praying for an allowance of a writ of injunction:

And whereas, the Honorable D. F. Coyle, Judge of the District Court of the State of Iowa, in and for Pocahontas County, has on the 26th day of November, 1913, made an order allowing said writ of injunction to issue upon the filing of a bond with sureties pursuant to said order; and whereas, said order has been complied with and such bond filed and sureties approved;

Now therefore, you the said John Forbes County Treasurer of Pocahontas County, Iowa, and others, Defendants as aforesaid, are hereby strictly enjoined and restrained from enforcing the collection of the alleged special assessment of taxes in Drainage District No. 29, in Pocahontas County, Iowa, against the lands of the plaintiffs described and set out as follows: Alex Peterson, the SW $\frac{1}{4}$ of 4-90-33, \$70.23; the E $\frac{1}{2}$ of NW $\frac{1}{4}$ of 9-90-33, \$11.31; W $\frac{1}{2}$ of NE $\frac{1}{4}$ and SE $\frac{1}{4}$ and N $\frac{1}{2}$ of SW $\frac{1}{4}$ 16-90-33, \$117.17; J. W. Clancey, S $\frac{1}{2}$ of SW $\frac{1}{4}$ 16-90-33, \$444.63, and NW $\frac{1}{4}$ of 21-90-33, \$217.48; C. F. Linnan, E $\frac{1}{2}$ of 17-90-33, \$469.02; Edward Korf, S $\frac{1}{2}$ of NW $\frac{1}{4}$, E $\frac{1}{4}$ of NE $\frac{1}{4}$ and SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of 20-90-33, \$467.83; J. M.

24 De Vul, S $\frac{1}{2}$ of SE $\frac{1}{4}$ of 18-90-33, \$52.50; William Breiholz, N $\frac{1}{2}$ of SE $\frac{1}{4}$, N. 10 acres of SW $\frac{1}{4}$ of SE $\frac{1}{4}$ and the N 10 acres of SE $\frac{1}{4}$ of SE $\frac{1}{4}$ of 20-90-33, \$340.47, and W $\frac{1}{2}$ of SW $\frac{1}{4}$ of 21-90-33, \$29.24; Mary Doyle, S $\frac{1}{2}$ of SW and S $\frac{3}{4}$ of S $\frac{1}{2}$ of SE $\frac{1}{4}$ of 20-90-33, \$250.39; P. S. Peiffer, E $\frac{1}{2}$ of NE $\frac{1}{4}$ and NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of 30-90-33, \$215.08; John E. Jordan, W $\frac{1}{2}$ of SE $\frac{1}{4}$ of 30-90-33, \$346.21; Fred Duitsman, SW $\frac{1}{4}$ of 30-90-33, \$107.29; Garlies Tweedale, Lots 3 and 4, Sec. 31-90-33, \$135.67, including the costs and interests on the above taxes, and to prevent the sale of said lands by you the said John Forbes, County Treasurer, at the regular tax sale to be held at Pocahontas, Iowa, to be held on the first Monday in December, 1913, until the further order of our District Court in the premises, and this injunction you must strictly observe under the penalties of the law.

Witness, W. E. Bollard, Clerk of said Court, with the seal thereof affixed hereto this 1st day of December, 1913.

[SEAL.]

W. E. BOLLARD,
Clerk of the District Court.

STATE OF IOWA,
Pocahontas County, ss:

I, M. M. Noah, Sheriff of said County, hereby certify and return that I received the within writ, on the 1st day of December, 1913, and that I personally served the same on the within named John Forbes, County Treasurer, Defendant, on the 1st day of December,

1913, in said County, by reading the same to him and by delivering to him a copy of this notice.

M. M. NOAH,

Sheriff of Pocahontas County, Iowa.

Fees \$2.35.

25 On Jan. 23, 1914, the Plaintiffs filed the following:

Amendment to Petition.

Come now the Plaintiffs, and amend their Petition hereinbefore filed, by adding immediately following Paragraph 36 thereof, the following, to wit:

Paragraph 36 A.

The plaintiffs further allege that the said assessment made, or attempted to be made and levied against their lands, on or about December 4, 1912, is void, for the following reasons, to wit:

(a) Because the said levy, or attempted levy was made without any notice, hearing, or opportunity for a hearing, or opportunity to the owners of said lands, or the plaintiffs in this cause, to object to the same, or to the apportionment thereof, or the classification of their lands, and the same constitutes the taking of the lands of the plaintiffs and depriving the plaintiffs of their property without due process of law, contrary to Article XIV, being the 14th Amendment to the Constitution of the United States.

(b) That the section of the Iowa Statute, to wit, Code Supplement, Sec. 1989-a-21, in providing for, or authorizing the assessment or levy of such tax without notice, hearing, or opportunity therefor, to the land owners whose property is sought to be burdened with such assessment and levy, is in contravention of, and in violation of the said 14th Amendment to the Constitution of the United States in that it deprives these plaintiffs of their property without due process of law, and such statute and the assessment or levy made thereunder, is therefore void and of no effect.

26 (c) And further, that said statute is void and in contravention of said constitutional provisions of the State of Iowa and the United States, because it makes no provision for a hearing, or opportunity to be heard, by the interested parties and those against whom and whose property, assessments and taxes are thereby authorized to be levied, upon the question of the property or necessity of the improvement, enlargement or repair, or upon the question of whether the benefits which will result therefrom will accrue to the property or owners, in the same proportion as the original apportionment and assessment or upon the question of whether any benefits will accrue to all of the property assessed for the original improvement.

(d) That the said pretended levy and assessment being made without notice or information to the plaintiffs or property owners, and without any hearing or opportunity therefor, either in respect to the property, or necessity of the improvement or the apportionment of the tax or the distribution of the burden thereof, is void because it is in violation of the provisions of Section 9 of Article I, of the Constitution of the State of Iowa, and because thereby, the plaintiffs are sought to be deprived of property without due process of law, and the same violates the Fourteenth Amendment to the Constitution of the United States; and the plaintiffs expressly claim the benefit and protection of said constitutional provisions.

(e) That said Section 1989-a-21 of the Code Supplement, in authorizing the making of the enlargement of the ditch and drain and the pretended assessment and levy without notice to the
27 said property owners, or hearing or opportunity therefor, is in contravention of the said Section 9 of Article I, of the Constitution of the State of Iowa, in that it authorizes the taking of property without due process of law.

Paragraph 36 B.

The said assessment and levy and the ordering of the enlargement, changes and additions to said improvement, were made without any hearing or notice, or any opportunity for hearing, and the said assessment and levy is in contravention of the provisions of the Constitution of the United States and of the State of Iowa, forbidding the taking of private property without due process of law, and is in contravention of the provisions of the Fourteenth Amendment to the Constitution of the United States, and of said Section 9 of Article I, of the Bill of Rights in the Constitution of the State of Iowa, and the provisions of Section 1989-a-21 of the Supplement of the Code of Iowa and other provisions of the statute in reference to the levying of assessments and taxes for the payment of drainage improvements, in so far as they authorize the establishment or ordering of the improvement and the making of such levy or assessment, without any hearing or opportunity for hearing, are void because in contravention of the said provisions of the Constitution of the United States and of the State of Iowa.

Paragraph 36 C.

And the plaintiffs further state and show the court that the said
25 levy and assessment in this petition referred to, were not, and are not required for the payment of the original improvement in accordance with the classification and apportionment in the construction of said improvement as originally constructed. That the said moneys are sought to be raised by said levy and assessment in large part for new and enlarged ditches and improvements, for the purpose of benefiting, and the same will benefit only a portion of the property and property owners whose property was assessed for said original improvement, the said prop-

erty and persons being other than the property of, and the plaintiffs described in this petition.

That the plaintiffs were because thereof, entitled to be heard in reference to the establishment and ordering of the improvement and the classification of their lands in ratio to the benefits and apportionment of the said tax, and before the same was spread, levied or assessed. That no notice of any hearing or any intention to make said levy or assessment, or to spread the said taxes was ever given to the plaintiffs, and no opportunity to present to the said Board of Supervisors, the claim of the plaintiffs in reference to a just and equitable apportionment of the said levy and assessment. That the amount of the tax to be exacted against the plaintiffs depended upon, and should be apportioned in equitable ratio in reference to the benefits derived from the improvement for which such expenditures were made, or sought to be made. And the plaintiffs aver and state that upon any notice or hearing, they would be entitled to show, and show, that all benefits to be derived therefrom would accrue to property and persons other than the plaintiffs or their property. That the said pretended levy and assessment constituted the actual taking of the private property of plaintiffs, without notice
29 and without any opportunity for hearing and without any opportunity to show that the original classification and apportionment, though just and equitable as to the cost of the original construction, is wholly unjust and inequitable to the plaintiffs, in so far as it involves the expenditures for which the said levy and assessment were made and now sought to be enforced.

T. F. LYNCH,
KELLEHER & O'CONNOR,
Attorneys for Plaintiffs.

The following answer was filed by all of Defendants except the Katz-Craig Contracting Company.

Answer in Equity No. 4152.

Come now all of the Defendants except the Katz-Craig Contracting Company and answering the petition state:

Par. 1. That they deny said allegations of said petition except such as are herein admitted.

Par. 2. Defendants admit the statements contained in paragraphs 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 20, 21, and 22.

Par. 3. These defendants admit that the Katz-Craig Contracting Company were overpaid in the sum of \$1,782.84; they allege that said overpayment occurred through inadvertence and mistake and without any fraud or wrong doing of either of these defendants; they state that they have caused an action to be instituted against the said Katz-Craig Contracting Company in district court of Douglas County in the State of Nebraska for the recovery of said overpay-

30 ment that said action is now pending in said court and that these defendants are advised by counsel that a judgment will eventually be secured for said overpayment, that as to whether or not said judgment (if obtained) can be realized on execution these defendants cannot state.

Par. 4. That the said Drainage District No. 29 was regularly established and comprises many thousands of acres within Pocahontas County, Iowa; that the acreage owned by the Plaintiffs is a very small portion of the total area of the district; that in due course and in the manner prescribed by law the assessment of benefits derived to plaintiffs' land by the improvements in the district and the rate and proportion of such benefits and the proportion of assessments upon the plaintiffs' lands were fixed and settled long before the institution of the present suit; that the plaintiffs have now been heard upon the question as to the amount and rate of assessment for benefits in the tribunal established by law and such assessments have been fixed by the Board of Supervisors of Pocahontas County through resolution properly entered; that neither of the plaintiffs took any appeal or exceptions to the action of said board in fixing such rate of assessment; that the contract with Hiatt was made in good faith and without fraud and for the purpose only of repairing the improvements in the said district; that it was the duty of the Board of Supervisors to keep such improvements in repair and for that purpose it made the contract with said Hiatt so that such improvements could be enlarged, reopened, deepened, widened and repaired and that such contract with Hiatt and the work contemplated thereby was by the board considered to be for the best interest of the public rights effected; that the costs of such repairs were assessed and levied by the board upon the lands
31 in the said district in the same proportion as the original expenses and costs of construction were levied and assessed; that all the levies and assessments made, contemplated or recommended in the said district were legal, necessary and proper for the repair of the improvements in the district.

Par. 5. That all of the levies and assessments described in the petition were and are necessary and proper for the repair of the improvements in said district as stated above; that all of the money contemplated to be raised by said levies will be necessary to meet the cost of said repair work and because thereof the board made said levies.

Par. 6. That if the plaintiffs are permitted to have the relief prayed for by them or either of them or any part or portion of it then the burden of and repair work and the cost thereof will be thrust upon the owners of the other lands in the district and thereby the plaintiffs will receive a wicked, illegal and unconscionable advantage and thereby the costs of repairing such improvements will be thrown upon the other landowners in the district and these plaintiffs will themselves escape the burden of paying any part of said repairs; that the assessments upon plaintiffs' land are necessary to pay for such repairs, which have now all been completed, and war-

rants drawn upon the funds of the district properly drawn have been issued for said repairs.

Par. 7. That plaintiffs well knowing of the said contract with Hiatt and knowing that the consideration for said contract would be levied upon the lands in the district and that a proportion of said consideration would be levied upon plaintiffs' lands, nevertheless stood by without objection and permitted the work contracted for by Mr. Hiatt to be completed or without any objection or exception upon the part of any one of the plaintiffs; and the plaintiffs and all of them are now estopped from objecting to the said assessments or any part of them.

Par. 8. That the order and resolution for the fixing of assessments and proportions thereof for construction of such original improvements, together with all repairs thereafter necessary was made on full notice to plaintiffs and on full opportunity to be heard; and such resolution and order cannot now be attached by these plaintiffs, but the same has become fixed as against plaintiffs by their failure to appeal therefrom and by the final action of the tribunal having jurisdiction in the matter.

Wherefore defendants ask that the petition be dismissed with costs.

F. C. GILCHRIST,
Attorney for Said Defendants.

The Defendant S. F. Hiatt filed the following.

Answer and Cross-Petition.

Now comes the defendant, S. F. Hiatt, answering the petition of the plaintiffs herein, and denies each and every averment and allegation contained in said petition, except what is hereinafter expressly and specifically admitted.

This defendant does admit that heretofore there was lawfully established Drainage District Number Twenty-nine (29), Pocahontas County, Iowa.

This defendant does admit that heretofore he entered into and contracted with the proper officers and board for certain work involved in the repair and completion of the drainage ditch located in said district as aforesaid.

This defendant does admit that a sum of money has been paid him for the work done by him as aforesaid.

This defendant does admit that there is had and owing from him as a balance for the construction of said ditch the sum of approximately Six Thousand (\$6,000.00) Dollars.

Aside from the admissions herein made of record this defendant has neither knowledge or information sufficient to form and to be as to the verity of the other allegations contained in the plaintiffs' petition, and he therefore demands that the plaintiff be required to adduce strict proof thereof.

Cross-Petition.

The defendant, S. F. Hiatt, for affirmative relief alleges and states to the court:

Par. 1. That heretofore he entered into a certain contract with the proper officers and board of Pocahontas County, Iowa, for the completion and repair of a certain ditch located in Drainage District Number Twenty-nine (29), Pocahontas County.

Par. 2., That said drainage district was lawfully established as by law provided.

Par. 3. That these plaintiffs are the owners of real estate located in said district.

Par. 4. That the occupation and different positions of the defendants are as alleged in plaintiffs' petition.

Par. 5. This defendant further states that he has fully complied with all of the terms and requirements of his said contract,
34 and with the terms and requirements of the law governing the same.

Par. 6. That the work in the construction and repair of said ditch was had and done by him as by law provided.

Par. 7. That said work and said ditch has been accepted and approved by the engineer in charge of said work and by the Board of Supervisors of said county.

Par. 8. That the defendants and each of them, with the exception of defendant, Katz-Craig Contracting Company, have refused and do refuse upon order of this court to pay this defendant the amount now due him for the construction of said work.

Par. 9. This defendant states that he has no plain, speedy or adequate remedy at law.

Wherefore, and by reason of the above and foregoing premises this defendant prays that the writ of injunction in this cause heretofore issued may be dissolved, and that the Board of Supervisors of Pocahontas County, Iowa, and the County Treasurer, and County Auditor of said county may be, by order of this court, required and commanded to take, adopt and perform such steps, measures and procedure as will lead to the payment of this defendant's claim, as herein set forth; and this defendant prays for such other, further, different and adequate relief as is equitable.

ROBERT HEALY,
Attorney for Defendant, S. F. Hiatt.

Duly verified.

On March 22, 1915, the following was filed by the Defendants.

35

Answer to Amendment to Petition.

For answer to the Amendment to the Petition of the Plaintiffs these Defendants now come and say that they deny all of the allegations therein contained except as the same are admitted by the Answer already filed by these Defendants, and they ask that the original Answer shall stand as an Answer to such Amendment.

F. C. GILCHRIST,
Attorney for Defendants.

On Oct. 18th, 1915, the Defendant S. F. Hiatt filed the following

Amendment to Answer and Counterclaim of S. F. Hiatt.

This defendant further avers that all of the work in cleaning out and repairing the ditch and drain referred to in this defendant's answer and counterclaim has been finished and completed and said Drainage District and this plaintiff have accepted the benefits accruing from said work of repair and cleaning said ditch and the same has improved and benefited their lands and that by reason of the foregoing premises the plaintiffs and all of this defendant's co-defendants are estopped to deny that this defendant is entitled to the relief which he seeks herein

On Oct. 21, 1915, the Defendant S. F. Hiatt filed the following

36 *Statement and Offer in Cause No. 4130 and No. 4152.*

Now comes S. F. Hiatt, defendant, in each of said causes and herewith and hereby offers to do and perform equity in each of said causes.

S. F. HIATT,
By ROBERT HEALY,
Attorney.

On the 30th day of January, 1914, the following entry was made and entered of record in District Court Record No. 8, page 110. "And now on this 30th day of Jan., 1914, this cause is consolidated with No. 4130. Same entry as in No. 4130, as of this date."

On March 23, 1915, the following stipulation was made and entered of record.

Stipulation.

By Mr. F. C. Gilchrist: Come now the parties, by their respective attorneys, and with reference to the order made by Judge Coyle at the January, 1914, term of court to the effect that the parties should take evidence in writing, and the parties now stipulate and agree as follows: That the plaintiffs shall take their evidence and complete the taking of the same by the 21st day of April, 1915; that such evidence shall be taken at such place as the parties may elect, not exceeding forty miles from this Court House; that the plaintiffs

shall give notice to defendants' counsel of the time and place of taking such written evidence at least five days before the commencement of the taking thereof; that the plaintiffs shall take and

37 complete the taking of their evidence on or before the 21st day of April, 1915; that the defendants shall thereupon have until the 5th day of May to take their testimony in writing, and they may elect where it shall be taken and give like notice; that rebuttal testimony shall then be taken within three days after the defendants have completed their evidence, and then that surrebuttal shall be taken within three days after that; that objection will not be urged that this may require defendants to take evidence during the May term of court; that the case shall be submitted upon written testimony to Judge Coyle, under the order as made, provided the testimony is completed before the May term, and if it is not completed then that such case shall be submitted to Judge Lee, or the presiding Judge of this Court, whoever he may be, at the May term, 1915, of this Court, and that the order shall stand in other respects as made, this stipulation being made in furtherance of such order of Judge Coyle at the January, 1914, term; that this evidence shall be taken by Mr. Thurlow Taft, unless the parties agree to some other person, and the parties agree to agree upon some other person if possible.

By Mr. F. C. Gilchrist: Is this agreed upon?

By Mr. Robert Healy: Yes, sir.

By Mr. T. F. Lynch: That is all right.

Pursuant to said stipulation the following evidence was taken:

"It is stipulated and agreed between the parties to said action that the records and files of the County Auditor's office, pertaining to the proceedings of Drainage District No. 29 in said County may be introduced and read and used in evidence by either party and that the identification of such records and files is waived.

38 It is agreed between the parties that upon the hearing of this case by the Court all of the records and files including engineer's reports, plats, profiles, estimates, and minutes of resolutions of the Board of Supervisors, reports of commissioners, both on assessments, and damages and contracts with the contractor whether of record or on file may be read and used as exhibits subject to the right of any person to urge objection that the whole or any part of the same is irrelevant, immaterial, and incompetent to the issue, but that no objection will be made to the manner or form of the proof itself, that no objection will be urged that the papers are not the best evidence but that the substance of these papers or records themselves may be objected to for any legal reason urged at the time of the submission."

On Apr. 16, 1915, at Fonda, Iowa, the following evidence was then taken:

ED. CARTER, being duly sworn on behalf of Plaintiff, testifies as follows:

Have lived in Fonda, Iowa, for about seven years. Have been leveling down dredge banks. Know the ditch in this community, which is called District No. 29. Exhibit "C" offered in evidence. I recall an occasion when Mr. Hiatt was doing some work on this ditch in question. I worked for Sam all summer. It was the 2nd of April, three years ago I commenced. I worked for him all summer.

Q. Now I wish you would examine this Exhibit "C" and
39 tell us as near as you can where you worked, Mr. Carter.

A. This is on the Branch that comes up through the Town Lot Co.—. That is what you are getting at first?

Q. Yes, on Branch A first.

A. Well I commenced at the outlet on this Branch and worked up as far as we went. Up very near to the road—say twenty rods of the road.

Q. The east and west road?

A. Yes, sir. Almost to the Illinois Central railroad track. Now the Illinois Central on this Exhibit "C" is marked "I. C. R. R." and the other railroad track is marked "C., M. & St. P. R. R." Between these two points at the outlet I made from the outlet to the north side of the Milwaukee track with team and scraper and from there on up as far as we went I sloped the west side with team and scraper. Mr. Hiatt was working there then over on the other side cleaning out. I cleaned the west side and he the east side.

Q. Describe as best you can how much you enlarged that ditch?

Objected to by the Defendants as irrelevant, incompetent, and immaterial. Not based upon any statement of fact and because furthermore the parties would be bound to pay for the work that was properly done even though additional work was done, which additional work might have been unauthorized; and further there has been proof offered and suggested that additional work was paid for beyond what was legitimate repairs in the district.

40 A. Why we made it about three feet deeper and fully five and one-half feet wider at the bottom with a slope—oh, we must have sloped it one and one-half to the foot. Sam cleaned out the bottom and I sloped on the west side with team and scraper. I went down the side of the ditch about three feet. This continued throughout the length from the Chicago, Milwaukee & St. Paul track north, as far as we went on Branch A.

Q. I want to know whether you dug the ditch deeper than originally constructed?

Same objection by Defendants as before.

A. Yes, sir.

Q. How much deeper?

A. About three feet.

I know of a galvanized corrugated iron culvert in the road running east and west across this ditch. We excavated right around the

neighborhood of three feet lower than the culvert. That culvert is in the road in this ditch on what is marked on this map, the J. W. Busby farm on Section Thirty-four immediately south of Fonda. Mr. Hiatt used dynamite to loosen the earth in the bottom of that ditch along that line.

Q. And just explain how he did that Mr. Carter?

A. Got into the bottom of the ditch and used—well it is a drill or auger for that purpose to bore holes in the bottom of the ditch. Put dynamite in and exploded it.

Q. How long a distance did this work extend where the dynamite was used?

A. Well, I should think in the neighborhood of five or six rods. It was used because the bottom was so hard it could not be removed; on account of the hard ground, gravel in the bottom of the ditch.

41 Q. Mr. Carter was this after or before the mud and slush in the bottom had been cleaned out?

A. Well—

Q. That the dynamite was used I mean.

A. Do not think there was any mud in there—No.

I worked on the main line of the ditch. Commenced on Mrs. Pat. Kelly's, here at the road on the west side of Mrs. Pat Kelly. Worked from here clear up around to old lady Woods' west line, marked Sarah T. Woods on this plat. All I did on this main line was to level the banks for Sam on the main ditch clear up to Mrs. Woods' line. While I was thus engaged Hiatt was working on the job. Hiatt quit working on the main line at the west line of the Woods farm. There was a place in the main line of the ditch where Hiatt used dynamite. That was over in the Mercer place, marked the James Mercer land on the plat. Could not tell how much deeper he dug that than originally dug. On this main line I worked the banks down so he could get the machine over.

Q. I want to refer again to Branch A. Had it been excavated above the point where you quit work before you cleaned it out?

A. Yes, sir.

Q. And did you make it as wide or any wider than it was before that point?

Objected to by the Defendants for the same reason as urged in the last objection.

A. Oh, I should think it would be a little wider.

Q. Was it deepened any below that or as deep?

Same objection.

A. Well, counting the fill up on the other it would be lowered quite a bit. Two and one-half feet probably.

42 Cross-examination:

Mr. Hiatt was a good workman. A hard working man. Did his work properly and in good shape.

Witness recalled:

We started to clean the main line of the open ditch in 29 on the SW $\frac{1}{4}$ of Sec. 35, in Cedar Twp. on the west side of the Milwaukee railroad. We cleaned out up to Sarah T. Woods on the line of the E $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Section 36. That is the west line on the east side. There was no cleaning out or digging from there on up to the entrance, of lateral B.

Q. Now Mr. Carter, going back to Branch A, and that portion between the Milwaukee and the Illinois Central railroad track, did you see the first ditch that Sam Hiatt constructed on that land?

A. Yes, I saw that.

Q. What were you doing there? How often were you there?

A. When we moved there with the machine to clean out the last time, I saw the ditch and I was going to work for Sam down here on the same ditch when he was scraping it out with horses when we were first building it.

Q. Are you familiar with both ditches; the original ditch and the cleanout?

A. Yes, sir.

Cross-examination:

43 I never took any levels on the original ditches constructed by Hiatt. Had no reason to pay any particular attention to the original ditch as originally constructed until we moved back and cleaned it out. The cleanout was possibly two and one-half to three feet deep on an average.

Redirect examination:

I think we cleaned the ditch below the original ditch full a foot. We widened out the bottom from four feet to about five and one-half feet. Must have widened out the top at least three feet. The banks that we widened out were solid. This ditch had filled some. It was a slow grade originally and likely to fill in. I do not think the sides were crumbling.

Q. As to Branch A, you yourself did not do the cleanout at all? That is, all you did was to slope up the west bank?

A. Oh, that is on the Busby land. I made from the Milwaukee track to the outlet with team and horses.

Q. That is on the cleanout job?

A. From the Milwaukee is about eighteen rods to the outlet, and I made that.

Q. Now below the railroad, state whether or not you widened that?

Objected to by the Defendants as incompetent, irrelevant, immaterial, leading and suggestive.

A. Yes, lowered it fully a foot and a half, and widened it—I think that is at widest part of the ditch.

Q. Where it empties into the main, how much did you widen it?

A. That must have been widened down at the south entrance of

outlet, I must have made it fully three feet wider than it was down there.

44 Further cross-examination:

At both sides of the railroad it was a slough or swamp. Right south of the railroad it may have been a swamp once but I wouldn't call it one. It was very low, wet ground. Probably a swamp originally, at the mouth of where Branch A emptied into the main.

FRED PETERSON, on behalf of Plaintiff, testified as follows:

Live in Fonda. Am twenty-nine years old. Know the ditch near Fonda, called District No. 29. I worked on part of that ditch. I worked on Branch A and the other side of the railroad south of the Illinois Central. I also worked north of Alec Dunne's land. I saw the Branch A ditch below where I worked from there to where it had outlet into the main ditch before it was cleaned out. We started right on the end of this open ditch and went northeast. The ditch we dug was larger than the other before cleaned out. It must be two feet deeper I should judge. About twice as wide than what it was before. Sam Hiatt constructed Branch A originally. I remember the occasion when Mr. Hiatt and Mr. Carter were cleaning out and enlarging this ditch between the two railways. The ditch when they finished working on it the second time, was wider and deeper than it was when Sam Hiatt fixed it the first. It must be, in my judgment, right around three feet wider if not more. Must have been two and one-half feet deeper. I know the steel culvert being put in in that ditch in the road at the north side of the Busby land. It was put in right after the first open ditch was made with teams. Mr. Hiatt was 45 working there first with teams. I think that the culvert was laid a little lower than the bottom of the ditch as originally dug, four or five inches after Mr. Hiatt worked there the second time. The culvert was about a foot and a half higher than the bottom of the ditch as Hiatt left it the second time. I think the ditch was widened on both sides at the time Hiatt and Carter were working there the second time.

Cross-examination:

I am working at leveling ditch banks now for Mr. Carter. Am not related to any of the parties to this suit. Helped Sam Hiatt dig this ditch originally. Worked right down through Busby south of Fonda one and one-half days. I never took levels on the ditch originally dug. I was out there one time and Sam told me to see whether it was deep enough or not. I helped a man named Barnes put an open ditch somewhere on Alec Dunne's farm. We started at the end where Sam left off the open ditch and went down, I judge, about a foot and a half deeper than the old ditch. Barnes had the contract and I was helping him. Worked for

Barnes I should judge about eight weeks. I didn't keep posted on the time. It must have been three years later than when Sam dug his ditch. Went out there for Lew Barnes and came down to the Illinois Central railroad track with teams making ditch a one and one-half feet deeper than we found Sam's ditch. Excavated about one and one-half feet deeper than it was at the Illinois Central and farther south.

46 Redirect examination:

I saw this Hiatt ditch after it was completed the first time. Maybe every week, or such a matter. Farmed near there. I saw it frequently after it was cleaned out and enlarged.

Recross-examination:

My memory is rather indistinct as to dates and years. Could not tell the time without refreshing my memory. I have been too busy.

ED RATHBUN, testified on behalf of Plaintiffs, as follows:

Have lived in Fonda, Iowa, for thirty-two years. I remember the time when Mr. Hiatt was constructing the ditch, Lateral A or Branch A in District 29. I follow the occupation of tiling. I had occasion to examine this Lateral A or Branch A after it was constructed by Mr. Hiatt, I think about 1912. I made surveys for tile to be emptied into it. Those surveys were made I think in the spring of 1912.

Q. 1912? Now examine this map. Identify it as Exhibit C and tell us Mr. Rathbun where you made these surveys for the tile drain to empty into this Branch.

A. Well, the first ditch began about two hundred feet north of the road. South side of Section 26 I believe—27. About two hundred feet north of that culvert.

Q. You mean the culvert in the road at the north side of the Busby land?

47 A. Yes.

Q. And how far north of that culvert did this twelve inch tile empty into the ditch?

A. I should say about two hundred feet.

Q. How deep did you find the ditch at that point?

A. Something like two ten.

Q. Two feet and ten inches?

A. Yes.

This was a couple hundred feet north of the culvert in the road. Two other tile emptied into it. One probably seven hundred feet north of that and the other maybe one thousand feet north of the first one. Could not tell how deep the ditch was where those two tile laterals emptied without referring to my level book. I have my level book. The first one named A was a twelve inch, open ditch, where we set stake on the bank it was two ten deep. Branch

B, I call the second one, was two nine, and C, the third Branch, is two nine. I have examined this ditch after it was cleaned out and enlarged by Mr. Hiatt. I have been down two or three times since it was widened out. I was at the ditch three or four different times before it was cleaned out and enlarged.

Q. What do you say as to whether that ditch is any larger since it was cleaned out by Mr. Hiatt than it was originally constructed?

Objected to by Defendants as irrelevant, incompetent, and immaterial. And for the further specific objection that the witness himself is incompetent to answer the question, for the reason that he has not shown himself familiar or acquainted with the way and the conditions in which the ditch was originally constructed and the question is further objected to as leading and suggestive
48 and calling for an opinion or conclusion of the witness.

A. It was about twice as wide and would be two and one-half feet deeper.

I made measurements in the fall of 1914 to ascertain the yardage which would be excavated from the ditch after cleaning out and enlarging it. We began where the Barnes ditch began and where Hiatt left it the first time. We measured across the top. Took top measurements, stepped down and took bottom measurements. Took a level on one side of the top then levelled and centered the bottom then went down one hundred feet and did the same thing and so on down the ditch each hundred feet. Took top measurements and bottom measurements for width and also for level of top and bottom. Did the same thing at intervals of one hundred feet along the ditch Hiatt had cleaned out. Made figures to show the result. Paper given and identified by the reporter as Exhibit D, offered in evidence. (This paper cannot be found so as to be abstracted herein.)

Q. You may state whether the figures upon the sheet which the reporter has marked "D" is the result of the computations and measurements you made?

A. First column, that is the measurement taken, we began at that. That will simply be the stake number we staked the ditch.

The figures at the top represent the point where we started at the junction of the Barnes and Hiatt ditches, and one, two, three, four, and so on down would indicate the points in the ditch at intervals of one hundred feet where we took measurements. The second column represents the depth of the ditch in feet and inches.

49 The third column indicated the average width in feet and inches. The fourth column represents the yards, in each one hundred feet. At the bottom of the sheet the figures which marked end of ditch, represent the end of main dredge from the bridge down to the creek where the end of the old dredge originally was. That was the portion that was dug over in Calhoun County. Those measurements are correctly made. I did not see Mr. Hiatt working on this ditch when he originally constructed it. It might have been a year afterwards before I saw the ditch. Branch A of the tile started eight inches under water

from the bottom of the tile. Branches B and C started about three inches. There was not enough water in the open ditch at that time to amount to anything. I saw those tile outlets after the ditch was enlarged by Mr. Hiatt the second time he worked there. They were then about two feet above the bottom of the ditch.

Cross-examination:

I was in Dakota at the time Hiatt did his first work. It was probably two years after Hiatt did this work that I took the measurements. Branch A between the railroad passed through some very low wet swamp lands. Immediately north of the Busby land there was low, wet, swamp and slough originally. I call Branch A on the plat Main A, the twelve inch tile I call Branch A. This was put in at one side of the swamp. I outletted it into the Hiatt ditch. The Hiatt ditch was about two feet eight inches deep. I notice on this plat about at a point along the line of the Hiatt ditch seven hundred or eight hundred feet north of the Busby land is also shown a swamp or pond. I made no measurements of this ditch Hiatt dug at the time he had finished it. Two years before I took the survey for Branches A, B, and C. The figures which are shown on Exhibit D were made in the fall of 1913. The Barnes ditch was dug the winter or fall of 1912. To my best judgment the first time I saw the Hiatt ditch to examine it was about two years after completion.

Redirect examination:

In making these measurements shown on Exhibit D I started at the upper end of Branch A as Hiatt constructed it and went down to the main ditch.

Further cross-examination:

Branch B was a short Branch about two hundred fifty — long. The grade was an inch to the one hundred feet. Branch C for the 1st four hundred feet, one inch to the one hundred. It also outletted into the Hiatt ditch.

Exhibits E-1 and E-2 introduced in evidence.

Further redirect examination:

Have looked up on the dates as to the time the survey was made for A, B, and C; "A" April 10, 1911, the others ("B" and "C") on April 12, 1911.

S. F. MOELLER, for Plaintiffs, testified as follows:

Live at Rockwell City, Iowa. Am a drainage and civil engineer for about twenty years. Have had considerable experience in laying out, surveying, and measuring ditches. Have taken contracts for constructing them. Associated with my brother John Moeller, of Knierim, Iowa, in the firm of Moeller

Brothers. Had occasion to examine and make surveys in what is called Drainage District No. 29, Pocahontas County, last fall. I supervised taking levels upon a main line about one thousand feet north of the south line of the SE $\frac{1}{4}$ of Section 33, Pocahontas County, or the County line. From that point northeasterly along the main line to the junction with Branch A near the Chicago, Milwaukee & St. Paul railroad and then later on I personally took the levels on Branch A from its junction with the main line at the Chicago, Milwaukee & St. Paul railroad to the source of this Branch A, crossing parts of Sections 34, 27, and 26 in Pocahontas County. This was done in connection with the drainage investigation of the Big Cedar drain for Pocahontas-Calhoun and Sac Counties. I was employed by J. P. Moore of Rockwell City, engineer of the big cedar. At the time I took the levels I made two cross sectional measurements of Branch A in drainage district No. 29. I have made additional measurements this morning. Ed Rathbun of Fonda, Iowa, was with me this morning. When I first took the measurements our investigation at that time was to determine the drainage conditions in the lower part of this drainage district No. 29 as being tributary to the big cedar drain. We concluded from our investigation it would be advantageous to the district to deepen or lower the end of the main line and put a tile into Branch A, so as to convert it into a closed drain instead of leaving it open. Have made measurement of the ditch of Branch A of Drainage District

No. 29 Pocahontas County, Iowa, and of that portion of 52 Branch A the first twenty-three hundred feet beginning at the junction of Branch A with the main line near the Chicago, Milwaukee & St. Paul track, thence going in a northeasterly direction across parts of Sections 34 and 27 to a point about two hundred fifty feet from the east line of Section 27.

Q. What was the total yardage you found from the figures, was in that portion of the Branch that you just measured as you testified?

Objected to by the Defendants as immaterial.

A. Five Thousand nine hundred ninety-four cubic yards.

This portion of Branch A drainage district No. 29 has not the appearance of having been washed out. It appears as though it might be a very little filling since it was constructed. In order to determine the station here we took levels and really surveyed the ditch and measured it besides. Those figures and Exhibit "F", two pages, are the results of our investigation and measurement. Top and bottom widths were measured this morning. Depth and cross sections Oct. 8, 1914, when I took the levels of top and bottom to determine the cuts or depths of the ditch.

Exhibit "F" offered in evidence.

My observation of this drain in comparison to other drains I have investigated I find the grade on this very light and those grades usually fill. I could not say exactly the grade but it is somewhere between three and four one-hundredths and some parts even less. Very flat.

53 Cross-examination:

E. C. Rathbun and myself made this set of measurements this morning on the ditch and got back to this hearing. In making these figures the top width and bottom width were the figures we took this morning. The cut are figures took in Oct., 1914.

Q. How do you know that these stations, for instance station four or five is where you took the bottom width and top width today corresponds exactly with the stations where you took the cuts last fall?

A. The stakes are still there.

ALEX PETERSON, on behalf of Plaintiffs, testified as follows:

I have land in drainage district No. 29 Section 16 in Pocahontas County, also in Sections four and nine. I do not get any tile or open ditch on my land from this drainage district. I don't know how far it is from my land to the open ditch. About one and one-half to two miles. We had an outlet there before anything was established. I do not remember the time when Branch B was put in. The open part of Branch B was put in before the cleanout on the main.

Redirect examination:

I did not know they were cleaning out this ditch and repairing it until we got our tax receipt. I didn't know the contract had been let to Mr. Hiatt. First learned of it from the tax receipt in the year 1913, in the spring.

54 G. M. TWEEDALE, on behalf of Plaintiffs, testifies as follows:

I own land in Section thirty-one on the north side of the Illinois Central between the Illinois Central and the public road. Branch B open ditch runs along the north side of my land. The cleanout did not extend to my land. The cleanout was about a mile below my land the way the ditch runs. I had tiled my land into the open ditch Branch B of 29 before the cleanout was had. My tile was about three feet deep at the outlet.

Cross-examination:

I have one hundred four acres and a fraction of land. I am one of the Plaintiffs in this case.

ED KORF, on behalf of the plaintiffs, testified as follows:

I own the S $\frac{1}{2}$ of the N W $\frac{1}{4}$ of 20, and the E $\frac{1}{2}$ of the NE $\frac{1}{4}$ and the SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of 20. Branch B extends through my land. It is all tiled. My land is one hundred twenty rods from the open ditch of Branch B. Before Branch B was in there was a twelve inch tile through my land. The tile was about two feet deep at the outlet.

We had the land on the $8\frac{1}{2}$ of the NW $\frac{1}{4}$ of twenty tiled too. Branch C that comes up there is tiled. It empties into the open ditch on the SW $\frac{1}{4}$ of nineteen over a mile from my land.

55 Redirect examination:

Q. Did you know anything about their cleaning or repairing the main in 29?

Objected to by the Defendants as irrelevant, incompetent, and immaterial, leading and suggestive.

A. No, sir.

Q. Ever know of their letting contract for same?

Same objection.

A. No, sir.

Cross-examination:

I owned the land all the time during the proceedings in this case, June 1, 1911, was the first I owned the land. I owned the land when the ditch was going through.

FRED DUTSMAN, on behalf of the Plaintiffs, testified as follows:

I own the SW $\frac{1}{4}$ of Section 30 in Colfax Twp. The open ditch in drainage district No. 29 goes partly through my land. The main ditch goes right along the line on the west side. Branch B goes on the south side of the road. I remember the time the main ditch in 29 was cleaned out or deepened or dug out the second time. It came three-fourths mile below my land; stops on the Woods west line. The main ditch along my west line has never been cleaned out. My land was tiled before they cleaned out the main west of the Woods land. My outlet was about six feet deep. Some of my land drains into Branch B. Branch B was built at the time they
56 cleaned out the main. It furnished me a good outlet. Branch B along my line is an open ditch.

Cross-examination:

I outlet about half of my system of tiling in Branch B and about one-half in the main. My land was tiled before the cleanout. After the Branch was dug I tiled my land and after the main was dug I put in tile in the main. I cannot see any difference in the work of the tile or outlets before the main ditch was cleaned out and now. It does not work any better now than before. The filling in the open ditch before my land did not affect the drainage of my land.

C. F. LINNAN, on behalf of the Plaintiffs, testified as follows:

Own the E $\frac{1}{2}$ of Section 17 Colfax Twp. That is in drainage district 29. The open ditch nor any of the tile go across my land. I

had this land partly tiled out before drainage improvements in 29 were constructed. The south three eighths of the one-half section there was tile on them. They were not completely tiled. The $8\frac{1}{2}$ of the $SE\frac{1}{4}$ of Section 17, is drained into tile Branch B, largely the $8\frac{1}{2}$ of the farm. That is the way I had it drained before.

WILLIAM BREIHOLZ, witness on behalf of Plaintiffs, testified as follows:

I own land in district 29 on Branch B. That Branch through my land is tiled. I have the north one hundred acres of the
57 $SE\frac{1}{4}$ of Section 20 Colfax Twp. My land is right south of the Charles Korf land and southwest of the John Clancey land. Did not have any tile drains constructed on land before drainage improvement in 29 was made. My land is about two hundred fifty feet from the open part of Branch B. Do not remember the time when the main west of the Sarah Wood's land had been dug out again after first built. There is no open ditch on any of my land. Whatever I have I tiled. I am one of the Plaintiffs in this action.

Q. Mr. Breiholz, you say you knew nothing about their doing any extra work or cleaning out the main or branch A in district 29?

Objected to as incompetent, irrelevant and immaterial.

A. No, sir.

Q. When was your first knowledge of it?

Same objection.

A. When we got the tax receipt.

Cross-examination:

I got the tax receipt in the spring of the year two years ago when the first assessment went on the tax receipt. I knew the original ditch was established. There was a little double taxation on the other eighty. I did not take an appeal from the assessments. Appeared before the Board; asked them to reduce the assessment. They said it was too late. I knew about the building of this ditch in 29 the first time. I did not know that the ditch was filled up. Never paid any attention.

58 P. S. PEIFFER, on behalf of Plaintiffs, testified as follows:

I own the $E\frac{1}{2}$ of the $NE\frac{1}{4}$ and the $SE\frac{1}{4}$ of the $SE\frac{1}{4}$ of Section 30, Colfax Township. The open ditch runs through my land, that is Branch B. I did not know that they were cleaning out or repairing the main or Branch A in drain 29. I think it was half through when I heard they were cleaning it out. Did not know anything about a contract let to Mr. Hiatt. Did not know of the assessment until I got the tax receipt in the spring of 1913. That is the first notice or knowledge I had. Did not have any of my land tiled until the ditch came in.

Cross-examination :

Knew of the original proceedings when this ditch was established. Knew there was a district being established including my land. I didn't know whether it was tiled or open. Rather would have had it tile. Appeared before the Board and they were discussing whether to make it tile or open ditch.

JOHN E. JORDAN, on behalf of the Plaintiffs, testified as follows:

Am the owner of the W $\frac{1}{2}$ of the SE $\frac{1}{4}$ of Section 30 in Colfax Twp. in drainage district 29. A portion of the drain extends across the land. I think it is Branch B. That Branch there has never been repaired, deepened, or widened or cleaned out since constructed.

Did not know anything about the work they did on the main 59 and Branch A in 20 in regard to cleaning and repairing. We heard contract was let to Mr. Hiatt but do not know when. Did not know when the assessment was made. Did not receive notice before the tax. Learned that the land was taxed when I got the tax receipt.

Cross-examination :

I knew what the original tax was when the first tax was put on for original construction. Filed objections and appeared before the Board of Supervisors once or twice during the course of the proceedings. I knew that Hiatt was cleaning out the ditch, the lower portion. There never was any cleanout on Branch B. Did not know the condition of the ditch before the cleanout as to whether that open ditch had been filled up or not. I heard that it was but never examined it. I am one of the Plaintiffs in this case.

GEORGE W. DAY, on behalf of the Plaintiffs, testified as follows:

My name is George W. Day. Formerly County Auditor of Pocahontas County. Since I have been County Auditor I have been deputy or official in charge of drainage matters or records in Pocahontas County. I have with me drainage records of Pocahontas County so far as that record embraces the proceedings of the Board of Supervisors and other officials of district No. 29. Also have the papers and records and files of the Auditor's office of Pocahontas County that pertain to that drainage district. The drainage record to which I refer is the drainage record which is marked on the back "Drainage Record No. 6, Pocahontas County."

Q. And in one part of that volume I find commencing 60 at page 240 the label attached to page 240, drainage improvement district No. 29. Are the proceedings to which you have just referred contained in the drainage records of the County Auditor's office, those contained in that volume commencing at page 240 and including 273?

A. Yes, sir.

Q. What papers Mr. Day are spread upon that drainage record?

A. I believe that all the papers except the construction reports of the engineer and engineer's estimates are spread upon that.

Q. I see. The book itself to which we have just referred is the one the reporter has marked "Exhibit "G" E R C". Mr. Day, it may not be necessary to offer the entire record, which is very lengthy and will be very extensive to set out in print in case of an appeal and transcript, but I want to ask you a few questions. You were County Auditor at the time of district No. 29 being originally petitioned for?

A. Yes, sir.

I have been familiar with the proceedings in that district from that time on. For the last seven years I have been employed and in charge of the drainage business in Pocahontas County. The first petition in drainage district No. 29 seems to be July 12, 1904. A number of others appear to follow dated later in the year 1904. On page two hundred fifty and subsequent pages the engineer's report being the preliminary survey by engineer Wheeler.

Q. I find in examining this drainage record, page 460, that the record itself recites the names of the persons filing objections
61 but does not appear to set out the objections that were in fact filed. Is this in accordance with your recollection?

A. I do not recollect now.

Q. I ask because you said with certain exceptions, all proceedings were in the Drainage Record. Then it may be true that there are matters actually filed that are not spread upon the record?

A. Yes, sir.

Q. Mr. Day, it appears the last proceedings in reference to this drainage district are dated about Nov. 14, 1914. Have any proceedings been had since not entered or spread on the record?

A. Why I don't recollect of any. I guess it isn't there. That is just as far as it was when it went to the Bond Company.

Q. Now Mr. Day, the work of Mr. Hiatt, contractor, under the last contract which he made and which I take it is one jointly in controversy so far as covered by progress certificates, is covered by this Exhibit "P"?

A. Yes, sir, I believe that covers it entirely.

"Exhibit P" is offered in evidence.

Mr. Kelleher: We offer in evidence from Drainage Record No. 6, which has been identified as Exhibit "G" in this case, the report of A. J. Wheeler, engineer, purporting to have been filed June 5, 1905, and appearing in said Drainage Record on Pages 250 to 258 inclusive, and which reports include the plans of improvement, recommendation of the engineer, and estimate of cost.

EXHIBIT "P",

is as follows:

Engineer's Estimate of Work Done upon Ditch No. 29. From July 1, to Aug. 23, 1911.

Pocahontas County, Iowa.

S. F. Hiatt, Contractor.

Quantities-Cubic Yards Excavation.

Section	This estimate.	Previous estimate.	Total estimate.	Price.
2	6801	.....	6801	30c

Value of Estate.

This estimate.	Previous estimate.	Total estimate.
\$2,040.30	\$2,040.30

Remarks.

For Cleaning Out from Sta. 417 Plus 50 to 500 Plus 55.

	This estimate.	Total estimate.
	\$2,040.30	\$2,040.30
Deduct 20%	408.06	Paid in Warrant No. 3038
Amount payable to contractor .	\$1,632.24	

8-23-11.

W. B. WARRINGTON,
Engineer.

Engineer's Estimate of Work Done upon Ditch No. 29 from Aug. 23 to Dec. 16, 1911.

Pocahontas County, Iowa.

Sam Hiatt, Contractor.

Quantities-Cubic Yards Excavation.

Section	This estimate.	Previous estimate.	Total estimate.	Price.
..	11,000	.....	11,000	28

Value of Estate.

This estimate.	Previous estimate.	Total estimate.
\$3,080.00	\$3,080.00

63

Remarks.

For Cleaing Main Ditch. From Sta. 0 to 115 and Outlet in Calhoun.

This estimate.

\$3,080.00

Deduct 20% 616.00

Amount payable to contractor .. 2,464.00

W. B. WARRINGTON,
Engineer.

*Engineer's Estimate of Work Done upon Ditch No. 29 from Dec.
16, 1911, to Aug. 5, 1912.*

Quantities-Cubic Yards Excavation.

Section	This estimate.	Previous estimate.	Total estimate.	Price.
..	19,349	.....	6,801	30c
..	.....	.....	11,000	28c
..	.....	.....	19,349	28c

Value of Estate.

This estimate.	Previous estimate.	Total estimate.
.....	2,040.30
.....	3,080.00
\$5,417.72	5,417.72

Remarks.

First estimate.

Second estimate.

Third estimate for completing cleanout.

	Total estimate.	This estimate.	Total estimate.
	37,150	\$5,417.72	\$10,538.02
Deduct 20% .....	.....	1,083.54	.....
Amount payable to contractor .....	.....	4,334.18	.....

W. B. WARRINGTON,
Engineer.

64

Q. Then can you point out to me which of the papers that are included in the whole bundle or package or file marked "H" is the final for that particular record?

A. The one dated August 5, 1912.

Q. And that is the last one in file Exhibit "H"?

A. Yes, sir,

Q. Now part of that report seems to be in ink and part in pencil. Is that in pencil in Mr. Warrington's handwriting?

A. I do not know. I do not know whether it is or not.

The report of August 5th, 1912, referred to as the last one on file, "Exhibit H", is as follows:

Pocahontas, Iowa, Aug. 5, 1912.

W. B. Warrington, Drainage Engineer.

To the Honorable Board of Supervisors of Pocahontas, Ia.

GENTLEMEN:

As engineer on Drainage District No. 29 I wish to report that the contractor "Mr. Sam Hiatt" has completed his contract for cleanout in Drainage District No. 29 to my satisfaction.

Respectfully,

W. B. WARRINGTON.

The following notation appears on said report in lead pencil:

Upper end of Main	6,801 Cu. Yds. @ 30c.
Lower end of Main	26,750 Cu. Yds. @ 28c.
Branch A	3,599 Cu. Yds. @ 28c.

Q. Well Mr. Day, if these lead pencil figures following the signature of Mr. Warrington are not in his handwriting, are you able to verify them by reference to any other record or to determine whether the yardage computed for the various portions of the work as set out in that memorandum are or are not correct?

Put there another way? This pencil memorandum seems to classify into three classes in the yardage covered by the Hiatt work to wit: into the upper end of the main, lower end of the main and Branch A. Do you know whether that computation is correct or are you able to verify it from any other source?

A. Only way would be comparing with his estimate of what it was. If we could find that report he made of the proposed cleanout.

Q. Mr. Warrington did make some final report and filed in the Auditor's office covering the last Hiatt contract?

A. That is the report there.

Q. You mean this paper, August 5th, 1912?

A. Yes, sir.

Q. Isn't that a certificate rather than a report? A certificate showing the amount due?

A. No. That just states it is finally completed.

Q. Mr. Day, then it appears from conversation that has occurred between counsel and yourself that has not been taken of record that Warrington did at some time prior to the commencement of the work by Hiatt on the last contract, outline in a written report to the Board, the work to be done?

A. Yes, sir.

Q. That written report is not spread on the drainage record?

A. No, sir.

Q. And the written report itself, are you able to find it?

A. No, sir.

Q. You have searched for it?

66 A. Yes, many times.

Q. And Mr. Warrington, who made the report, is dead?

A. Yes.

Q. Do you know where his own personal records were preserved, if preserved?

A. I think they are——

Q. Who has them?

A. A. L. Thornton.

Warrington did not keep carbon copies. He just kept his field note book and made these reports from that field note book. If it is in existence A. L. Thornton has that book.

Q. We offer in evidence Exhibit "II," same being the file or package of papers heretofore identified and referred to. Mr. Day would you also indicate under what date appears the final estimate or certificate for the first contract of Hiatt in that Exhibit "H"? The paper you have pointed out as being the final estimate on the first contract of Hiatt is one under date of Nov. 2, 1909?

A. Yes, sir.

The paper under date of Nov. 2, 1909, part of the exhibit "H" is as follows:

W. B. Warrington, Drainage Engineer.

Pocahontas, Iowa, November 2, 1909.

To the Honorable Board of Supervisors of Pocahontas County, Iowa.

As engineer on Drainage District No. 29 I wish to report that Section No. 7, has been completed to my satisfacaion by the
67 contractor Mr. Sam Hiatt. And I would recommend that
you accept the said section and settle with Mr. Hiatt for
3829 cubic yards.

Respectfully,

W. B. WARRINGTON.

No. 3878.

Exhibit 11 I.

Taft.

Q. Which is the result of the original construction of that part of the Improvement known as Branch A?

A. Yes. The Hiatt contract of Branch A.

Q. That would be the open work in Branch A, I take it?

A. Part of the open work on Branch A.

Exhibit "Q" includes the entire set of profiles for the Improvement as it was finally planned by the engineer, Warrington, and upon which the original contracts were let for the construction of said Improvement. Exhibit R is the original plat. Mr. Warrington did not make a profile at the time of the last letting to Sam F. Hiatt of the contract for what is called the cleanout. There is no profile showing any changes. At the time Mr. Warrington filed this missing report he did not file a profile. I do not know whether there

was any engineer who was associated with Mr. Warrington in that work at that time—I mean making cross sections and surveys—An assistant rodman or anything of that kind. Mr. Thornton may have.

Q. Mr. Day, the assessment which was levied or spread for the last Hiatt contract was spread without giving any notice of any kind to the property owners?

A. I think so.

Q. And the contract Mr. Hiatt had was not let upon advertising for bids?

(Defendants objected as immaterial.)

68 A. I do not recollect. We received bids.

Q. Was there any advertising?

A. I do not recollect the advertising.

Q. You do not recollect whether there was advertising or not?

A. No. But we had other bids.

Q. That was not what I asked. Was it advertised?

A. I do not recollect. I don't think it was.

It is stipulated between the parties that preliminary to the contract made with S. F. Hiatt for the past work, called in the records, "The cleanout," there was no advertising in the newspapers or publication or notice published of the letting of the work.

Cross-examination:

There was no notice published of an extra assessment, outside of the minutes of the Board of Supervisors. As part of the Exhibit "H" which has reference to Branch A of Drainage District No. 29, is the following report under date of Nov. 11, 1910; also report of engineer Warrington, under date of June 12, 1913.

Pocahontas, Iowa, Nov. 11, 1910.

To the Honorable Board of Supervisors of Pocahontas County, Iowa:

GENTLEMEN:

The main ditch in Drainage District No. 29 between Station 0 and 85 has filled to such an extent as to cause Branch A to fill, and I would recommend that you have them cleaned.

69 I think that Branch A should be cleaned from Station 0 to Station 23. And that the Main ditch should be cleaned from Sta. 0 to Sta. 90. There will be about 500 cubic yards in Branch A and about 5000 cubic yards in the Main.

Respectfully,

W. B. WARRINGTON.

W. B. Warrington, Drainage Engineer.

Pocahontas, Iowa, June 12, 1913.

To the Honorable Board of Supervisors of Pocahontas County, Iowa.

GENTLEMEN:

As engineer on Drainage District No. 29 I wish to report that the open ditch on Branch No. A has filled some between Stations 46 and 52. And I would recommend that you have it cleaned. It is only filled about 1½ feet but the land laying North East of this point has a poor outlet on account of this fill.

Station 46 is just north of the steel highway bridge which is on the ¼ line Road in Section 26-90-34 and Sta. 52 is at or near an 8" tile outlet about 600 feet North of the bridge.

Also the Illinois Central Railway Co. have riprap-ed the sides of this same ditch where it crosses their tracks at Bridge No. W 409-25, and have encroached on the ditch to such an extent that there is a 26" waterway where there should be a 5 foot waterway. This riprap-ing should be changed sufficient to make a 5 foot waterway.

Respectfully,

W. D. WARRINGTON.

Exhibits "I" to "R" inclusive offered in evidence.

Recalled:

I have with me the drainage assessment record of this County. The original assessment as confirmed and levied by the Board of Supervisors in District 29 is found on pages 170, 185, inclusive. In cases of appeals having been prosecuted from assessments as originally levied, the amount that the Court fixed is indicated by entries in this book. This book that I have with me is known as "Drainage Assessment Records No. 1."

Q. Will you explain Mr. Day, in what manner the assessment now in controversy in this case appears in the pages to which your attention has been called?

A. This column marked "Amount of 1912 tax list" would be the amount placed on tax list to be collected during 1913.

Q. That represents the relevy involved in this action, does it?

A. That represents the relevy and interest.

Q. Will you explain a little in what way the figures appear any where on this record if they do otherwise than inserted in that column under the head of amount of 1912 tax list? Do they appear elsewhere as a levy confirmed by the Board?

A. This is the amount. There was the Auditor's office figures to place on regular tax list that they turn over to Treasurer to collect.

Q. Is there not spread in your drainage record itself a tabulated statement of the levy for the reassessment or additional assessment?

A. No, sir.

Q. Turn to your records. Begin with what the Supervisors did as recorded in the Minute Book entitled "Supervisors' Minute Book

Number 6." On pages 527 and 528 appear certain minutes in respect to levy for special and drainage taxes for the year, 1912.

71 And now is that the only record of the action of the Board in respect to the levy in controversy in this case?

A. Yes, sir.

Q. We offer in evidence from said minute book Number 6 from pages 527 and 528 thereof, the proceedings of the Board of Supervisors in respect to what is called special and drainage taxes for the year 1912 which so far as it applies to matters in controversy in this case is as follows: "In the matter of making the levy and special and drainage taxes for the year 1912, same having been adjourned to this date, on motion the following drainage levy *were* made and ordered spread on the tax lists for the year 1912 in the ratio as original assessments were made and confirmed * * * in Drainage District No. 29, \$682 to pay interest on bonds and \$11,500 to pay outstanding indebtedness * * *

It is further ordered by the Board of Supervisors that all special taxes are hereby levied against the property designated when certified to the County Auditor by the proper authorities and the making of the order for further drainage levies is on motion adjourned until December 19, 1912"; the proceedings appearing under date of Wednesday, December 4, 1912.

Q. Mr. Day, now the Auditor's office is shown by the record and to which we referred a moment ago, by drainage assessment record No. 1, thereupon carried into the column which has been indicated and which is headed "amount of 1912 tax list" certain figures and items intended to apply to each of the forty acre tracts in the district 29?

A. That is the intention.

I did not do the figuring personally. I cannot tell who did it.

72 Do not know what factor was used in determining what sums would be inserted in that column. Do not know what rate of interest was computed for the bonds. Have not had my attention called to the fact that the bonds appear to have been figured at 6%. In fact I believe they draw $5\frac{1}{2}\%$. We have no record in the Auditor's office which shows the condition of the funds in drainage district 29 in Dec., 1912. Those we obtained from the Treasurer. The amount of the outstanding indebtedness and also the amount on hand at the end of the year we can tell. In the Auditor's ledger there would be the balance on hand. On Dec. 31, 1912, there was a balance on hand of \$1,195.45. The district had that sum in its funds. That is cash on hand. There was outstanding warrants. The record does not show what warrants were outstanding. We would go to the Treasurer's office and find his register of warrants and that would show it.

Q. Do you know of any person who did make a calculation? A member of the Board of Supervisors or any one else at the time this action was taken by the Board in Dec. 1912?

A. Why Mr. Terry, Auditor then, and I think Mr. Forbes, were the ones who made the figures.

Q. At that time of course the 1780 odd dollars had been paid to the Katz-Craig Company and had depleted the funds of the district to that extent?

A. I do not know whether that had been paid or not. The warrant had been issued for that.

Q. That warrant was paid years ago? Wasn't it?

A. I do not know when.

Q. Do you know what the totals appearing in this column in the assessment records are compared with the \$11,500 and interest on drainage bond? Does it figure the same amount or do you know?

73 A. I do not know; I am sure.

Q. Will you turn to the footings of the columns "amount on 1912 tax list" and tell us the footings as to the total?

A. The footings show \$12,634.03.

All the bonds were issued in that district at that time. \$23,400 of the authorized issue. \$11,000 were not delivered at that time. That would leave \$12,400 of delivered and outstanding bonds drawing interest. Undelivered bonds of \$11,000 were not drawing interest. The assessments were drawing interest. And were actually \$12,400 delivered bonds drawing interest in Dec. 1912, when this resolution was adopted. Interest at the rate of $5\frac{1}{2}\%$. The Katz-Craig overpayment, or alleged overpayment, of \$1,780 odd dollars was included in the \$2,675.83 warrant, that had been paid April 30, 1912, before this December levy was made. This drainage assessment record which has been offered in evidence shows what the original assessments were outstanding and unpaid by property owners as well as the amounts of the various assessments. I have examined to ascertain whether or not the contractor, Hiatt, a party to this case gave any bond to secure this contract, on the reclean. He did give a bond. It is in the vault.

Cross-examination:

Q. At the time the Board made its levy at district 29, being in December, 1912, what was the amount that should have been levied or was necessary to be levied in order to pay interest upon the bonds for the ensuing year?

74 A. The amount that should have been placed against each tract of land in which the assessment had been unpaid would have been interest at 6% from the date of the levy by the Board. I believe November 28, 1911, up to January 1, 1912, and then at the rate of $5\frac{1}{2}\%$ from January 1, 1912, to January 1, 1913, which would have made about 12%—a trifle over 12.

Plaintiffs object to above because not responsive to the question and the objection is to the substance of the answer. That it states a mere conclusion and opinion of the witness and invades the province of the court; passed upon a question of law and is incompetent question in calling for the amount of bonds only and for that reason we did not object.

Q. I will ask it this way in order to make the record a little more secure. In view of the objection at the time of the levy of the Board in 1912, what sum, if any, was due upon the dollar of unpaid taxes when an owner had failed to pay his taxes and interest on bonds

and what sum on the dollar would be due or was due upon each dollar of unpaid taxes and interest on bonds? Limiting your answer simply to such interest as was then due or would fall due before the next time for levying upon bonds should arrive?

Objected to by the Plaintiffs as calling for mere opinion and conclusion of the witness. Not calling for any facts and incompetent and invading the province of the Court.

A. 12%.

Q. Why do you say that? Upon what ground do you so state?

A. The assessment would be confirmed by the Board on November 28, 1911, drawing interest at 6% from that date up to the time the bonds were issued and from that date draws the same rate that the bonds do from November 28 to January 1, 1913, would amount to 6½%, and January 1, 1913, next payment due, would be 5½%.

Q. Is that the manner of collecting interest when levying interest in the auditor's office?

Same objection by Plaintiffs.

A. Yes, sir.

Q. Is that the manner in which other interest levies were made on other men in this district other than the Plaintiffs in this case in case there were any who had not paid their interest installments?

A. Couldn't say. Never figured those.

Q. If the interest on the bonds fell due during the year 1913, it should be collected in the year 1912 with the 1912 taxes so as to have it on hand to pay interest in 1913. At the time the Board made the levy in the fall of 1912 of the \$11,500 there were outstanding contracts which had not been fulfilled which would be due and payable. There were engineers, claims for damages, and, I believe, some incomplected contracts—that is my recollection.

Further cross-examination:

I believe B. L. Allen's damage claim was unpaid. This claim in the amount of \$550 was allowed after the time of the entry of the Board in December. I couldn't give you now a list of the claims I thought outstanding December 4, 1912.

Recalled:

In making my calculation of interest I figured one year too much at 6%. It should be about two months at 6% and two years at 5½%. The bonds draw interest from January 1, 1912. The assessment was made November 8, 1911.

Further direct examination:

There was due on December 1, 1914, or about that month, 12% on the dollar of each dollar of unpaid original assessment in the district.

Redirect examination:

There would be just 11% due on the bonds.

Q. I see by this resolution to which you have referred, adopted by the Board, March 22, 1912, that there were unpaid assessments in the amount of \$23,422.60, including the township road assessments. Is that according to your recollection?

A. I do not recollect for sure. They sometimes included those and sometimes didn't.

The road assessments in the district amounted to \$3,752. I do not know whether it could be figured out at this time what amount was owing by the drainage district. The amount of warrants which had then been issued to Mr. Hiatt were included in that indebtedness.

Further cross-examination:

The Katz-Craig payment was made in April, 1912. The funds of the district have been depleted that much. This overpayment was discovered in the suit of B. F. Allen against the drainage district.

77 Further redirect examination:

The officials themselves made the overpayment and they discovered what they had done when the matter was revealed in the Allen suit.

J. W. CLANCEY, one of the Plaintiffs, testified as follows:

I own two hundred forty acres in Drainage District No. 29. My land is served by Branch B. It is partly open work and partly tile. The open work does not extend to my property. I am a drainage contractor. Am a member of the firm of Linnan and Clancey. The firm have a contract for some work in the drainage district. We had open work on Branch A. We had from Station 23 to I think it was 85. This was straight ditch work. We done it with teams.

Q. Where was the work you contracted to perform or the firm contracted to perform in Branch A, with reference to the part of Branch A that one Hiatt subsequently had under contract?

A. Well, we started off where he had it finished up to station twenty-three.

Q. His work then was on the line of drain below your work?

A. Yes.

We did the open work on A in the fall of 1910 or the early part of 1911. Hiatt had the original contract for the part of Branch A that was below the work we done. He also had the second contract for the same work. With reference to the time we did the work on

the upper part of Branch A, it was a couple of years before
78 that he did the work under his first contract. He was not working on the so-called cleanout on this Branch A when we were working on this upper portion. He did that work subsequent to the completion of our part of the open work. I have seen the work Hiatt did under the so-called cleanout. I saw the work that was done under his first contract on Branch A. I know about the width that we started and about the width his ditch was when we hooked

onto it. The top of our ditch was about twenty-four feet and I should judge the ditch we hooked onto that he made was about six or eight feet narrower. I wouldn't say there was a great deal of difference in the bottom of the ditches only that we were considerably deeper. Our work began at station 23. Our work is two feet deeper than that below station 23. I observed that portion of the Hiatt work from station 23 to the highway somewhere around eight or nine hundred feet. I have been a drainage contractor four years or more. The original part of the Hiatt work was done with scrapers. The side slopes of the work we did on Branch A was very near the same as Hiatt's. I saw the work that was done by Hiatt under the so-called cleanout contract.

Q. What opportunity did you have to see it? I mean what occasion did you have to see it?

A. Well, I passed it several times and walked over it several times.

Q. How was that work done? With scrapers and machines, or how?

A. Well, it was done some with machine and some with team.

Q. What difference, if any, was made in the work as it had originally been done by Hiatt and as it was done under his second contract as to whether it was any deeper, wider, and if so, to what extent?

79 A. Well, I could not say—just how much deeper—but I would say that it was a good one-third to one-half wider than it was.

Q. Was the depth increased to the same depth as your ditch or not?

A. Yes, sir. It was put down on the same depth as ours.

Q. How much did you say yours was deeper than the old one?

A. I said two feet deeper.

Cross-examination:

In saying this I refer only to the Hiatt cleanout on Branch A. When we finished our ditch, our ditch was two feet lower than Hiatt's ditch was. Compared in depth to the original Hiatt ditch, ours was deeper. In places the Hiatt portion of Branch A, as originally constructed, had filled up. In my judgment cleanout was really necessary for the best interests of Branch A. Our work was done by reason of being a contractor for a portion of this ditch under re-establishment. I was one of the petitioners urging the Board to increase and rebuild it. Branch A up to station 23 plus, being the Hiatt part of Branch "A", had been completed at the time we petitioned the Board for the ditch to be enlarged.

Redirect examination:

Q. Now when you say that your ditch, a portion of Branch A, you built as contractor, was two feet lower than the work originally done by Hiatt, do you mean two feet lower than the work was
80 originally finished by him or two feet lower than it was after filled?

A. I mean the original.

Q. Two feet lower than the original work he did?

A. Yes, sir, that is what I mean.

Q. That is independent of any filling in his work?

A. Yes.

Q. Do you mean the increase in width from the one-third to one-half was an increase over the original width?

A. Yes.

The part of Branch A, Hiatt originally built was done by him before certain changes in the plan of the ditch.

Cross-examination:

I had no notice of any special assessment or of any additional assessment except the first assessment that was made for original construction.

S. F. HIATT, being sworn, testified as follows:

Am the gentleman who had two different contracts with the Board of Supervisors of Pocahontas County with reference to drainage district No. 29. The first of those contracts I think was made in 1909. Under that contract I began that work about the 1st of June and completed it about the first of October. I began the work under the second contract on or about the 20th of June, 1911, and finished about the 20th of July, 1912. Mr. Warrington was the engineer in charge of the construction on both contracts. I was personally in charge of the work and was on the ground most of the time. The work under both contracts was open work. Under the first contract I built part of Branch A from about station 81 toward the outlet, 23 stations. Under the second contract I did some work on Branch A and some on the main. Part on the upper end and part on the lower end of the main. The second contract was divided into three locations. I did work at the outlet with scrapers. The work on Branch A under the second contract was principally with the machine. The lower part of the main exclusive of the outlet, on the second contract, I did with scrapers. I was furnished with cuts of the work by the engineer of the work to be done. I do not know where they are. I tacked them on the machine until we were by the stations and then we pasted on new ones. I never kept any track of them. I did not check the engineer's figures over. Do not know whether I was allowed enough or not. The bottom width of Branch A under the first contract I think was about four feet. Do not recall what the average depth of the cut was. Under the second contract stakes were set up by the engineer for the work, grade stakes. I did the work in accordance with those stakes with the exception of the slope.

Q. What do you mean?

A. The work I did with the teams was outside of the stakes. The engineer had nothing to do with it. That was done by myself and Dooley.

Q. By Dooley? Do you mean a member of the Board?

A. Yes.

Q. What did Dooley do?

A. The ditch was dug with the machine a little too straight up and down to suit me and he wanted to know if I would slope it, and I did a little with the scraper.

I cannot recollect what was the bottom width of the work under the second contract. I could not say how much deeper we dug at the second time than the first. We dug deeper than the original grade. We probably went a foot below grade line. We followed the grade line of the engineer and kept all the fall we could. Did not have the profile for the second work. Had the cuts. Did not preserve the cuts. Have not my money yet. (Do not have an office. Keep my papers at home. Tacked all cuts I ever had on the machine and leave them there. I cannot answer exactly the total amount of yardage removed under the second contract. It was something like seven thousand yards at the upper end, 26,750 cubic yards in the lower end. Something like 3,599 cubic yards on Branch A. There were twenty-three stations in Branch A which comprise the second contract. That was the same area that was covered by the first contract. There was three thousand yards or thereabout required to be taken out on Branch A on the first contract. The first twenty-three stations of Branch A were filled in some places when I did the work under the second contract. It was filled along to some extent. Could not say to what extent. Had to use dynamite on the second contract. The earth that we used dynamite on was not mere silt but was solid. That was caused by the fact that we were going to lower the grade line. This 3,599 yards removed under the second contract included this earth removed with dynamite. I cannot say how many yards of earth were moved for the first time under the second contract. I do not know what the second specifications called for. Did not see them. The cuts were all I had. I used dynamite on the main line in one place. That was on the Mercer land east of the Dills-worth slough.

Q. For what extent of space did you use dynamite there?

A. Pretty hard to say—probably fifty feet.

I probably removed three hundred yards of earth at the outlet. I did not see the engineer measure it. He never had anything to do with it. I did not measure it myself. I never saw any person measure. I did not know to this day what the measurements were. I had a contract on 29 in Pocahontas County. It required me to make different changes in the ditch. I got my directions for changes from the engineer in charge and the Board of Supervisors. The engineer in charge was Mr. Warrington. His assistant was Mr. Lucius Thornton. The members of the Board who gave me directions were Mr. Dooley, Mr. Lieb, and Mr. Hopkins. Warrington was on the work probably once a month. Sometimes oftener. I cannot remember whether I followed the survey used by Mr. Warrington for the completion of the work. He gave me the figures as I went along. I put them on the machine. I do not know what the figures are. Have no book with them in. If the County Auditor should lose any of his records I would not know how to find out what work I had done.

Q. How many yards do you estimate of silt was actually in those 23 stations of Branch A at the time you went into the second contract?

Objected to by the Defendants as incompetent, irrelevant, and immaterial.

A. I cannot answer that on account I haven't the figures.

84 Q. Did it average a foot of silt from 0 to 23 in your opinion?

A. It averaged, I think, more than a foot.

J. A. MOELLER, witness on behalf of Plaintiffs, testified as follows:

Live in Calhoun County. Am a drainage contractor and engineer. Twenty years experience as an engineer, and as a drainage contractor twenty-five years, both private and public. I am somewhat familiar with Drainage District 29 in Pocahontas County. I recollect the time that the contract was let to Hiatt by the Board for the so-called cleanout, I walked along the banks of the ditch for the purpose of bidding before the contract was let. I talked to the Board of Supervisors in their office at Pocahontas. Asked them in regard to whether they had any cleanout work. I think we had a drainage ditch letting and I asked them if they had any cleanout work. They said they had and would let me know when they got ready to clean it. That was some time in the summer. I went over that some time in the spring when I was in Fonda, but when I talked to them I couldn't say whether it was in the middle or fore part of the summer because I was up there several times to lettings both in the spring and summer. The reasonable value of that kind of work such as I saw along the ditches in drainage district No. 29 of removing the silt and reexcavating them to the original grade line, as that ditch was in the early summer of 1911, both on the branch and the main line, would be from 20, 22, and 25c per cu. yd. In my talk with the Board they didn't set any price. They

85 said they would advertise it. I have done some cleanout work. Built ditches in Pocahontas, Calhoun, Webster, Wright, Kossuth, Emmet, Marshall, and Story Counties. I have been over branch A since the work was done, last fall when the levels were taken. Doing work on the big Cedar drainage district. We didn't run the levels any further north on Branch A than the Illinois Central Railroad.

Q. Can you tell us what the cross section of the ditch for 23 stations below the Illinois Central known as branch A is?

Defendants object as irrelevant, incompetent, and immaterial, leading and suggestive.

A. I measured it. I forget what. I haven't any book, could not say just what width—different widths. From eighteen feet I think some places. Some places about twenty-three or twenty-four feet, but it seemed to be all widths. Of course some places caves out or sloped off.

Q. Do not know the bottom width?

Defendants make same objection,

A. I think it was from six to eight feet nine, one place. That was on top of the silt in there now.

Q. Do you know how much silt is in there now about?

A. Well, I don't. Some places comes about one-half way up on the tile. Could not say just how much. Other places just about to the bottom.

I was over that before the cleanout. I could not tell how the ditch compared in size and dimension, cross section as originally built and as it was after Mr. Hiatt did his second work. Noticed it was wider on account of where it crossed through under the bridge above the Milwaukee below the wagon bridge there but I could not say just how many feet.

86 Cross-examination:

I could not say exactly when it was I was at the courthouse when the Board told me they would advertise this letting or let me know. It was in the summer or spring I should judge about four years ago. That would be in 1911. I was at the courthouse at a tile letting job. I was bidding on the job. The members of the Board who were there, I think, Dooley, Lieb, Chris Nolan, I think McEwen, don't know who else. I know Hopkins wasn't there. I think it was Oleson. Had this talk after dinner in the Auditor's office. I have bid on many ditches in Pocahontas County. I got one. That was an open ditch. Am having trouble with the Board of Supervisors about getting my rights. As a matter of fact when I bid on any contract to any Board of Supervisors, I put specific clauses in the bid. In the contract that I finally did get in Pocahontas County or in which Pocahontas County was interested, various parties have filed bills and claimed liens, with the County Auditor. I have appeared before the County Board of Supervisors in Pocahontas County to file specific bids, fifteen or twenty times. I would have done the same in this case. If there was any specifications, I would have told them. I would have written the bid myself. I have surveyed last fall the main line of drainage district No. 29 where Hiatt made his cleanout. I ran the levels over it; took cross sections in several places. I know the contractors generally who do cleanout work in Pocahontas County. I know Mutti Brothers and Mr. Hiatt. I know contractors who did cleanout work in surrounding counties. George L. Meachain at Clarion, Chris Haiysted, Nevada, Iowa. Do
 87 cleanout work myself. We dug an old ditch in Marshall County, one in Story County and dug some in Wright County. In Marshall County in 1908. It was part new and part old. Took out about thirteen or fourteen thousand yards. The ditch was one and one-half miles long. We got 25c per yard for new work and out of the bottom of the old ditch. In this work on 29 I figured we would not have to tear down the machine. We would start at the lower end of Branch A. Would go up the main ditch to Branch A then would take Branch A up to the Illinois Central then have to move the machine across country. I did

cleanout work for Emmet county; it was on, I think, ditch 64. The yardage in that cleanout was about four or five thousand yards. We dug about three-fourths of a mile in Wright County. The main ditch was I think about th-rt-y-nine thousand yards—Seventeen thousand yards came out of an old ditch. The rest was a new construction. We dug that I think, in 1911, with a dredge line. I got 945 for it.

Redirect examination.

Horton and Mosley got 14.85c per cubic yard for their work. We got for Calhoun County cleanout 18c.

J. L. PARSONS, on behalf of Plaintiffs, testified as follows:

Am a civil engineer. Formerly the engineer located at Humboldt. Have had ten years experience. Have had college training at Cornell College, Mount Vernon, Iowa. Am the same Parsons who once was appointed as engineer on a commission to assess land in Improvement District No. 29, Pocahontas County, 88 Iowa. Am the same Parsons who filed a report on said assessment. Exhibit "B" is the original report which my commission made. We went carefully over that district. Examined all the land in the district, including the various Plaintiffs'. I have figures showing the cost of the cleanout work.

Q. And have you in the light of your knowledge of that district and the land therein, conditions existing there, gone over the matter for the purpose of arriving at a conclusion as to what would be an equitable basis for the distribution of the cost of that cleanout to be apportioned and to be distributed in proportion?

A. Yes sir.

Q. Have you made that in the form of a tabulated statement?

A. Why, I have it roughly in pencil. Yes, sir. Not in very good shape.

Q. You say roughly. Is it set out in tabulated form?

A. Yes, sir.

Q. In order to complete that so it would readily be understandable, did you desire to copy it?

A. It would be a little more neat and legible, to say the least.

Q. With the consent of counsel, Mr. Parsons may file typewritten statement of his conclusions as embraced in this report.

Mr. Gilchrest: Subject to the right to object as incompetent, irrelevant, and immaterial and that it is not material to any issue joined in the case.

I have had about seven years' experience making assessments in at least fifty or sixty drainage districts. The cost of the entire improvement varying from \$500 to eighty or ninety thousand dollars.

89 Those ditches included some in which there were branches and laterals in addition to the main drains and open work and tile in the same district. The so-called Skeels assessment in 29, which was made after my assessment, was a blanket assessment, as we called it. Did not subdivide into areas to be served by the various

branches and laterals but spread the assessment entirely over the district without such division.

Q. What do you say as to whether in your experience there have been in the last 7, 8 or 10 years such assessments spread in districts in which improvements were constructed that embraced any laterals and branches?

A. Earlier assessments by most engineers were made that way, but up to date engineers, all to my knowledge filed reports showing the amounts that each tract of land in the district should pay toward the main drain and then to each branch separately. Everything is shown in an itemized statement of that kind.

Q. When reports are made in the manner you say they are ordinarily now made, is the land which is served by a lateral assessed then, separately, for the benefits from the main drain and for the lateral itself?

A. Yes, sir.

Q. And in such cases, I assume that reassessments are spread likewise; that is, reassessments for benefits to a lateral or spread against that lateral.

Defendants object as incompetent, irrelevant and immaterial.

A. I never have made reassessment—cannot say what I have done as I haven't, but would do it that way if called upon.

90 Same objection as last urged and also further that it is purely voluntary observation on the part of the witness as to what he might do.

Q. Basing your answer on your knowledge and experience as an engineer why would you regard that as an equitable method?

Same objection and further that the evidence is incomplete as the statute of the State prescribes the method in which new assessments should be made.

A. Why, I would use that method simply because it is just, in my opinion, and for this reason: Well, we will assume now, that a ditch is dug, no laterals constructed, assessments for main ditch are spread, some of the outlying lands might be assessed on an equitable basis, ten, twenty, thirty, or forty dollars to the forty, and receive all the assessments due according to the benefit. Then take the same district, and construct laterals up through some of the side lines, and they might be benefited ten thousand dollars, to the extent of ten or twelve hundred dollars to the 40, sometimes more, and then their assessment on one forty, instead of fifty, might be ten hundred and fifty dollars. We clean out the ditch: If the lateral had not been assessed, we would prorate it, and his share of the cleanout might be twenty dollars or forty per cent, possibly \$50, whereas, if you include the cost of the lateral in with the cost of the main, and assess on that to raise the cost of repairing, he might pay, say 20% of his ten hundred and fifty dollars, or two or three hundred dollars, whatever it is. He certainly is not benefited more by cleaning out than

by the main, and by this you would assess this outlying forty and are doing it in this case, sometimes three or four hundred times the original ditch.

91 (Defendants move to strike out each and every observation, conclusion and statement of the witness in last answer, for the reasons urged before, and that it is not justice, and because, while Mr. Parsons is a fine gentleman, he is swearing as to the ultimate question which the Court, itself, must determine, and not Mr. Parsons.)

Q. Mr. Parsons, in computing the proportion of the assessments of the drainage in controversy, have you taken into consideration the question of what benefit those lands would get from the cleanout?

A. Yes, sir.

(Defendants interpose same objection.)

Q. In making that computation, did you have in mind the situation as you found it when you made the assessment, that is, elevation of land and relation of one tract to another in the district?

A. Yes, sir.

(Defendants interpose same objection.)

Q. The pencil memorandum you have produced is one which is now marked by the reporter as Exhibit W?

A. Yes, sir.

Q. We now offer in evidence Exhibit W, and with the consent of all parties, it is understood that Mr. Parsons may withdraw this and file a more complete copy, together with this memorandum, a more complete statement of the computations that are included within it.

Mr. Gilcrest: All right, with the statement that if desired, we will arrange for further cross-examination, subject to the stipulation on which defendants object to same as incompetent, irrelevant, and immaterial.

92 Cross-examination:

Q. This exhibit was made at a time when certain changes and enlargement in this district were probably contemplated but no definite action was taken.

Q. Then this Exhibit V is based upon an improvement and upon improvements in drainage district No. 29 which were never constructed?

A. The report, if I may amplify my answer, was the amount assessed for each 40 on the main open ditch. The changes made affected open ditch to a limited extent only and the only change made on the open ditch was at the upper end, where a small section was changed from ditch to tile, which change, if I were to reassess, would not affect the assessment on any of the land affected in this case.

I had field notes in addition to Exhibit V at the time we were making assessments. This Exhibit V does not attempt to classify lands

into low, wet, high or dry lands. We filed field sheets showing the classification and they are part of the records of Pocahontas County. I have investigated to know how much was assessed for branch A in this Drainage District on the cleanout. According to the figures I have, the yardage was 3599 yds. I did not figure how much Branch A has paid to this cleanout. I have field notes showing how much land was assessed as tributary to Branch A and Branch B. In some cases it is true, under the Skeels assessment tile branches had not paid for themselves.

Q. As part of the cross-examination, we would like to inquire of the witness as to what the other lands in the district would be assessed for on this cleanout job? I think it would be a good
93 opportunity therefore when making his statement which he is to make, we would like to have him show what he thinks the other lands should be assessed for cleanout as are the lands of his own clients?

A. Could I make a suggestion?

Q. Yes.

A. I could make a general statement that it would be 41.4% of the assessments shown in my original report for each 40 toward the open ditch.

Q. Then as I understand it, in order to make up your statement under this Exhibit W, you took just 41.4% of the assessments for the main which are shown by Exhibit V?

A. Yes, sir.

Q. Why did you take 41.4?

A. Because it took that proportion of the amount for the amount we assessed for the original open ditch to raise the money required for the cleanout.

Q. You would assess that same amount upon other parties who had tile?

A. 41.4%.

I took into consideration all other factors in arriving at the original. You must divide the job into units of some kind to assess, the main a unit, and each branch a unit. As to how much Branch A paid for the building of the main, if Branch A is a unit, depends on the lay of the land. Would have to go through the record and add together the amounts in Branch B and Branch A to determine what they should pay.

Redirect examination:

94 In my original assessment we divided the district into units. Each area served by a particular Branch, treated as a separate unit. The entire area in the district was included in the unit served by the main. The big trouble with the Skeels assessment was that he didn't do that, and one of the big troubles with the reassessment is that it attempts to spread it in accordance with the Skeels assessment.

Further cross-examination:

I could know, or readily find out, by looking at the Skeels assessment that in my judgment it was a wrong assessment. Anyone who cared to file objections to the Skeels assessment could do it and could readily see wherein it was defective and they could readily have brought that matter to the attention of the Board of Supervisors at the time the assessment was before the Board.

(Exhibit W, as testified to by the witness Parsons, cannot be found among the exhibits as filed in this case.)

JOHN FORBES, testified on behalf of Plaintiffs, as follows:

Have been County Treasurer of Pocahontas County several years. The Plaintiffs in this case made a tender to me, I made a memorandum of the amounts.

Q. Mr. Forbes, will you just state the exact amounts and date of the tender by the Plaintiffs in this case, to you; of money for the purpose of paying for the interest on the outstanding bonds or assessments of said Plaintiffs on the land in controversy?

A. Amounts were tendered December 1, 1913. J. W. Clancey \$207.37; Ed Korf \$100.25; William Breiholz \$114.16; Mary Dooley \$37.95; Charles Linnan \$147.93; John Jordan \$108.43; Alex Peterson \$124.56.

The tender was made to me in cash. I was at that time County Treasurer of Pocahontas County. I did not accept the tender.

Q. As a matter of fact, so far as your records show, did they indicate what amount of the tax list for the current year, was for interest on bonds and what amount was for an additional assessment?

A. Didn't show the separate amount—the tax list did not show the separate amount.

Q. The tax list had extended for each 40 acre tract, a lump sum that included both the interest on the bonds and assessments that had been spread to be collected that year did it not?

A. Showed the total for the amount opposite that name and did not set it out separately for forties.

Q. Not on your tax list?

A. No.

Q. The amount owned by each individual land owner was extended in a lump sum?

A. Yes.

Q. And that would include every 40 he owned in that section and whatever was placed on the tax list for interest on bonds, and whatever for additional assessment or otherwise?

A. Yes, sir, that is right.

Cross-examination:

Mr. Lynch and Mr. Schneiders made this tender to me. I do not remember exactly what was said. I made a memorandum of what

was supposed to be the facts. They did not tell me in writing.
96 Q. Did you have any way of separating the amount due from these gentlemen for interest on bonds and amount that showed against their land on the books?

A. I did not.

Q. Did you have any way of determining how much these gentlemen should pay for interest on bonds and how much they should pay for something else?

A. I didn't have that in the books.

Redirect examination:

Q. Mr. Forbes, can you tell from these records whether there were any outstanding unpaid warrants which had been issued on district 29 on December 4, 1912, and if so, what warrants and in what amounts?

A. I don't believe I could.

LOUIS O'DONNELL, testified on behalf of Plaintiffs, as follows:

Q. Mr. O'Donnell, I call your attention to this, "Assessment Record No. 1, Pocahontas County," to the pages from 171 to 185 inclusive, and to the column headed "Amount on 1912 Tax List." You prepared those figures?

A. Yes, sir.

I haven't any other record or memorandum of the figures, except as appears in that book only on the tax list. I took them off this book and put them on the tax list. This book is the original record. I do not know the rate of interest I computed in arriving at the totals put in that column. I took the amount to be raised
97 and got a per cent of the amount of assessment and figured it out. I took the amount to be raised and used the amount of assessments confirmed by the Board and figured it; got the per cent.

Q. I call your attention to page 172 and to the name, Henry Smith, in the first column under the head of "Owner", and the description of four 40 acre tracts underneath his name and the amount you carried out opposite those tracts. Do you know what factor you used in making this out?

A. The same as I did all of them.

Q. I wish you would see if you did.

A. Unless I made an error.

Q. Well, just figure what percentage.

A. The per cent is a little bit better than 13%.

Q. Did you use the same percentage as on Smith?

A. Yes, used the same on all of them.

Q. Are your results accurate?

A. Haven't figured them all. Around 13.13 or 13.14. I think I made an error in figuring Smith's account.

Q. There is apparently an error in some of these calculations?

A. Some of them, yes, probably is.

A. L. THORNTON, testified on behalf of Plaintiffs, as follows: - -

I was an employee or assistant of the late W. B. Warrington who was the engineer on district No. 29. I was all around helper and assistant. I was with him in the work done in district 29 during the year of 1911, and prior to the so-called cleanout. Mr. Warrington died a year ago February 11th, I have his field notes.

98 Those books record certain measurements made in the field in which I assisted. I did not myself keep an independent record of the work done. I was not related in any way to Warrington. I still keep the office Mr. Warrington kept at that time. So far as his field notes or similar records, are concerned, they have been preserved there in that office. I have made a search to locate and find any and all records of Mr. Warrington's relating to any of these checking up or surveys. I searched everywhere where I thought there was any show of getting any data. I brought certain field books here. These books I have produced and are those now marked by the reporter Exhibits "2", "3", "4", and "5". So far as I have been able to find in my search and so far as I know there are no other books showing field notes with reference to re-surveys or checking up this work. That is for Branch A up to Station 23 plus. Outside of that there are some notes on Branch A, field records. They are construction survey notes. Some of them were for a later cleanout. Cleanout of the upper end of Branch A. They do not refer to any part of the work Mr. Hiatt did. These books here now are all that contained field notes on the part Hiatt did.

Q. Can you tell us on what pages of these books of any notes covering that part of the work?

A. Page 44 of Exhibit "5" relates to the survey.

Q. For the cleanout?

A. Yes.

I assisted in making that survey. The initials "W. B. W." and "A. L. T." those refer to the initials of Mr. Warrington and myself. Interpreting these columns, the first column there is what we call station column. Next Back side column. The third 99 column is the instrument height column. The fourth column is rod reading column. The fifth column is elevation column. The sixth column is the grade line column. The seventh column would be the cut. The next column would indicate that the cuts had been changed to a uniform amount or an equal amount, each of them. And column where the other cut column had been raised, an equal amount, each one of them. Next column is the cut converted into feet and inches. The next column is the top width. I am a civil engineer and am County engineer. I assisted in taking the levels and making the survey from which those field notes just described are taken. The whole book, Exhibit 5, is such a book as a civil engineer ordinarily records his surveys. The record is made in the usual and ordinary way. So far as I know, in making the survey the levels were taken correctly and accurately. I was a rodman and helping generally. From

those field notes I am able to say what the fall was in that ditch. The ninth column would indicate the fall in feet and inches for each station. I was familiar myself with Branch A. The upper part of Branch A above Station 23 plus was originally planned for a tile and changed to open ditch. As I remember the upper portion changed from tile to open ditch, was constructed in respect to bottom, width, and other dimensions greater than the lower part had originally been constructed. The upper part was one foot wider bottom and one foot wider top width than the lower part as originally built. I saw the lower part of Branch A after the reconstruction or recleaning work was done by Hiatt.

Q. And how did the bottom width after the reconstruction of the lower part of Branch A compare then with the bottom width of the upper portion as it was built when changed to open ditch?

A. I did not make any measurements, but would say that it is comparatively the same. I think the bottom width had been increased of the lower part, to correspond with the upper part. Page 45 of Exhibit 5, also refers to the same work. The columns are the same in arrangement, with the exception of one less column. Those entries referred to are all in the handwriting of Mr. Warrington. The first four would have been made in the field. The others might be made in the field or in the office. That is the first and original record made by the engineer, these field notes of the survey. I do not know of any other record Mr. Warrington ever made of it. I have not been able to find any other. The original survey of Branch A is in exhibit 3, pages 99 and 100. Exhibit 3 is not in Warrington's handwriting. In Wheeler's. These books were found among Warrington's records where they were kept by Jim. I have not been able to find any record of the checking up of the excavation done by Hiatt under his recleaning contract. I did not assist in that rechecking. Do not know whether anyone went with Mr. Warrington. The portion of Exhibit 2, which is headed "Branch No. A" refers to the original construction survey. That is in Mr. Warrington's handwriting. Two pages refer to Branch A in that portion of Exhibit 2. They are double pages. That is the portion of Exhibit 2 which the reporter has now marked Exhibit 6. That is not the survey of the measurements made after the original construction. That would be levels run and cuts given to make the construction to make the excavation.

101 Cross-examination:

In the work that I assisted Mr. Warrington, I was the rodman and chain man. I made some of the surveys set out in Exhibits "2," "3," "4," and "5" myself. I do not know that Mr. Warrington set down the figures correctly. I do not know that the figures are a correct and true statement of the actual readings of the rod and chain.

The Exhibits identified by the witness, Thornton, in his testimony are as follows:

102 *Further Testimony of S. F. Moeller for the Plaintiffs.*

During the last few days I have examined the field notes of Warrington, contained in Exhibits "2," "3," "4" and "5" relating to Branch A of Drainage District No. 29. I made a survey of this portion of Branch A, which was originally built by Mr. Hiatt and afterward reconstructed or recleaned by him. My survey was made in Oct., 1914, and in Apr., 1915. I did not examine it before recleaning. I have gone over these field notes of Mr. Warrington's, referred to in Mr. Thornton's evidence, to ascertain what extent of filling there was in this Branch A as shown by Warrington's notes. According to my computations from the notes, I find that the existing ditch on Sep. 2, 1911, contained a volume of 3120 cubic yards.

Q. Explain just what you mean by saying it contained that many yards. Do you mean that there was an excavation, the cross section of which would show 3120 yards not filled?

A. Yes, sir.

Q. What would be the amount of filling then either in yardage or in depth deducting the unfilled excavation?

A. I find from the same notes that the average depth or cut of the existing ditch at the time referred to, was 3.52 feet.

The difference in yardage of the existing ditch and the yardage for which Mr. Hiatt was paid in his first contract, was 709 yards. According to the estimates for the first construction of this part under Hiatt's contract, the total was 3829 yards. I simply deducted from

103 that total, the yardage of the existing ditch as shown by Warrington's survey Sept., 1911. If the ditch had been excavated to the original dimensions it would have required the removal of some 709 cu. yds. That would replace the ditch the same dimensions for which Hiatt was originally paid for construction. I have further examined Mr. Warrington's field notes in reference to this Branch A for the purpose of ascertaining what difference, if any, there was, in the bottom width of the Branch as reconstructed by Hiatt and the bottom width as shown in the original estimate or field notes upon which the original estimate was based. I examined the ditch as it exists for top and bottom width in April, 1915. I found the top and bottom width both are wider than originally planned. I find the average top width 20.2 feet from my survey. The average top width of the estimate originally from Mr. Warrington's notes is 15.4 feet. As found on my survey the bottom width averaged 8.4 feet.

Q. And Mr. Warrington's original survey was what average bottom width?

A. 4.8 feet. These notes of Mr. Warrington's are as the ditch was found on September 2, 1911, when it was cross sectioned for cleanout. The increased size of bottom width in that, would be due to the fact that the bottom had filled to some extent. Therefore raising the bottom up in the cross section of the ditch, which had sloped sides therefore increasing the width of the bottom.

Q. Do you know the original bottom width, shown by Warrington's original estimate?

A. Original plans are four foot bottom.

Q. And you found the bottom actually, on your survey, to have average width of 8.4 feet?

A. Yes, sir.

104 Q. Were your own surveys of that actually made?

A. I believe they were.

Q. Now, what is the grade of that ditch, approximately, that part of the ditch we are considering, up to Station 23 plus?

A. The notes on the recleaning show a grade of .03 per hundred feet.

Q. Is that what you call a flat grade, or otherwise, Mr. Moeller?

A. For a small ditch, it was a very flat grade.

Q. Would such a ditch wash, in that character of soil?

A. It will not.

Q. What do you say, then, based on your knowledge as an engineer, as to whether the width you found, 8.4 in the bottom, and 20.2 feet at the top, could have been due to any underwashing, or erosion of the soil, itself?

(Objected to by the Defendants as incompetent, irrelevant and immaterial, calling for mere opinion and conclusion of the witness, in addition to all objections heretofore already urged.)

A. A very small part of this extra width is due to erosion of the banks, falling into the bottom of the ditch, which material I believe now is deposited in the bottom of the ditch.

Q. Now, would that increase the width of the bottom, however?

A. Yes, to some extent.

Q. By raising the bottom?

A. Yes, sir.

Q. Mr. Moeller, what is the character of the soil through which that ditch is constructed? Is it firm and hard or a loose soil?

105 A. It is both. There is part of it through very marshy land, and part of it appears to have been constructed through hard-pan, in one portion there seems to be considerable gravel in the soil.

Cross-examination:

I made my examination of this ditch as late as the fall of 1914 and the last month in 1915. I did not see Mr. Warrington set down those figures in books 2, 3, 4, 5, and 6. I do not know where he was when he set them down. I do not know anything as to the correctness of the figures. Branch A, as now constructed, as I found it, is not in good condition. It is filled about one-half a foot. Judging from the notes, I would think it was necessary to clean out Branch A along about the time Hiatt cleaned it out. I believe some such work was necessary. It is considerably wider than necessary on a great portion of it, both at top and bottom. For small territories an open ditch in the vicinity of Fonda, under the conditions there existing, must necessarily be dug larger than is necessary to carry off the water alone.

Redirect examination:

I found the field notes of Mr. Warrington made in the usual manner that such notes are made by civil engineers.

Further cross-examination:

106 In my estimates, as to the number of yards in these ditches, I counted to station 23 plus 70 on Branch A of drain 29. My estimate as to the number of yards of siltage in that ditch now would be about four cubic yards to the linear foot based upon the present bottom width. That would approximate about 340 yards. Exhibits S, T-1, to T-12 inclusive, "U" offered in evidence.

Defendants' Evidence.

S. F. HIATT, being duly sworn, testified for the Defendants, as follows:

Am one of the defendants in this action. Am forty-one years old. Have been engaged in the general drainage business for about nine years. I have had experience in drainage contract work in Pocahontas, Calhoun, Buena Vista and Palo Counties. Built two open ditches; is all the new work I have done. I have operated a cleanout machine for six years. As to the construction of drainage ditch involved in this controversy, the first work was done on Branch A. I made the improvement and the next work was when I took the contract for recleaning. The original construction I think was in 1909. I was engaged for about six months in that work.

Q. And when was it you took the contract for the cleaning out of this ditch?

A. That was in 1911—I ought to have posted up on that.

Q. Is Exhibit marked "X" the contract that was made in June, 1911, by you and the Board of Supervisors of Pocahontas County for the work in cleaning out the ditch?

107 A. Yes.

Exhibit "X" offered and introduced in evidence by the Defendant is as follows:

108 The main ditch was in use and operation about, I would say, four years before I entered upon the work of cleaning it out, under the contract Exhibit "X". The main open ditch was, I should think about twelve miles long. It was constructed in the southwest part of Pocahontas County. There was two open branches, A, and another. There was a number of tile branches. I had nothing to do with the construction and repair of tile branches. I think it was in 1906 when I first constructed or did any open drainage work in this County. The first ditch I built in Pocahontas County was fourteen, with teams and scrapers. We built it as nice as a ditch could be. It was partly through a slough and the next spring it had three feet of mud in it. The average filling in the main open ditch in this district was very light. In doing this work on the contract, marked "Exhibit X", I used what is called an orange

peel bucket; briefly, the operation of the machine; it is an ordinary hoisting engine with skid excavator. Operates from the side of the ditch and deposits the dirt from behind the machine. No part of the machine proper is in the ditch during the course of the operation. The bucket swings over the ditch and drops and the dirt is lifted straight up. I know Mr. Warrington, the engineer. He was in charge of the original construction and the cleanout work. He is now dead. He died after all of the work under the contract Exhibit "X" was completed. Branch A originally constructed, was constructed by me. I was there all the time myself. Excavating was done by horse and scraper. I started in the middle of April and got done about the 22nd day of November, 23 stations 2,300 feet on the cleanout of Branch A. They phoned me, I think at 109 Rockwell City, that they had some cleanout work they wanted

done and to be here on a certain day and I came up. Attended a meeting of the Board of Supervisors of this County. My bid was 30 cents on the upper end of the ditch and 28 cents on the lower end. Do not know how much the other bids were. They were higher. I was familiar and acquainted well with all the members of the Board of Supervisors in 1911 and before that. I held other drainage work with the Board before that. I had one quite large contract in district 14, original construction, for about four miles. That was all finished and completed before I started 29. We used dynamite on Branch A. We struck some short places of what is called compact sand. Something our bucket wouldn't catch and it lacked a few inches of being down—no big amount but it had to be done so we put in about one-half dozen shots of dynamite. I would say it was original dirt that had never been removed. We used dynamite on Mercer's land in the reclean of the main ditch. Mr. Warrington gave me stakes as the work progressed. I would stake it out for every one hundred feet and tell me to reclean it to a certain distance on each side where it would start to break. He wanted to clean it out so the ditch would stand. I received instructions with reference to the depth and width I was to carry the work of recleaning out under this Exhibit "X" from Warrington. They were in writing in regard to the depth. As a general rule would tack them on the machine. I would get them and then give them to the operator of the bucket and he would put them up and after we were by the figures did not pay any further attention. Completed the work under this contract Exhibit "X" in July, 1912. Mr. Warrington on

110 completion of the work made a general examination and inspection of the same. He gave me a final estimate or certificate at that time. It is filed with the Auditor. As the work progressed, I received from time to time 80% of that estimate. Two of those 80% warrants have not been paid. I received a warrant from the County Auditor of this County August 16, 1912, No. 3740 for \$4,334.18. It has never been paid. I am still the owner of this warrant. On the same date I received warrant No. 3741 for \$2,107.60. I am still the owner of that. I have been paid in warrants, all the balance of the work performed under this Exhibit "X". I have not preserved the original grade cuts or instructions from Mr. Warrington. I made no effort to preserve them. To the best of

my ability I followed the instructions given me by Mr. Warrington, the engineer, in charge of the work. I have received, all told in warrants for the work under the contract Exhibit "X" 10,500 and some dollars. Have received all of it except the two warrants, \$4,384.18 and \$2,107.60. I had conversations with the Plaintiffs in this case as the work progressed but do not remember whom. I know Mr. Breiholz when I see him. Did not talk with him. I did with Mr. Clancey and Mr. Linnan. The cuts and instructions from Mr. Warrington have been all lost and destroyed. I paid no attention to them after I was through with them. In following those instructions I actually excavated and threw out more dirt than required by the instructions.

Q. What do you say on Branch A when you entered on the work under Exhibit "X" to clean that Branch? The ditch was as deep and wide then as when originally constructed or had it filled in and become narrow.

111 A. The ditch had filled in or practically filled up for the reason that it had been pastured with cattle in there and they were continually standing in the ditch.

The average depth of Branch A at the time of the original construction was probably right around three feet. This ditch at the time I entered on the work of cleaning that was under Exhibit "X", was in bad shape. Thomas Brothers were on the ditch at the time I made my bid here to the Board. Their boat was actually on the ditch. They had a dredge boat. Mr. Thomas was before the Board offering to clean out the ditch at the time I made my bid. I don't think he could have cleaned it out at all with the boat. Couldn't have gone to the top cut. It would have been impossible to lift it over the high bank. He could not have done the work without taking out the bridges. With my boat I am able to do the work without taking out the bridges. I rebuilt or reset my machine twice on the upper end and three times on the lower end. In regard to doing the work in Calhoun County, I hired two teams, and men and scrapers and put them to work in Calhoun County after getting permission from the men owning the land, and had them scrape and put in a ditch about two feet deep and about twenty feet wide for the distance of about two hundred feet, maybe two hundred fifty. I done that in order for us to have more fall and thought I would have better chances for the water to get through and that I would do a better job in general. I did not get any pay for that only in the betterment of the work above. The culvert in the ditch on the north side of the Busby land, I put that in when I dug Branch

A originally. When I came back with a cleanout I did not
112 deepen or lower that pipe. This ditch was not lowered any below the culvert at the north side of the Busby land. At the time the culvert was originally put in it might have been a trifle below the bottom of the ditch. I would consider the fair and reasonable price for the lower end, 28 cents per yard and for the upper end 30 cents. The cleanout was made wider because it was reasonably necessary to preserve the work.

Cross-examination:

Branch A was made wider probably two feet on top. A foot or six inches on the bottom. The original bottom width when first constructed I thought was four feet. It was made probably one and one-half feet wider and the second time probably one and one-half feet at the bottom. We never did very much measuring to see whether the machine was cutting as wide as the contract called for. We had as a rule gone on the conditions of the ditch regardless of the cuts the engineer gave us. I can't remember what the cuts called for. I have made no search for the cuts. The member of the Board who gave us instructions were Mr. Dooley. He told us to take out what would fill in. Mr. Dooley visited the ditch frequently. Gave me instructions. Followed these instructions as nearly as I could. Lieb visited the work; gave us instructions. Followed those instructions. Warrington visited the ditch. Gave us instructions and I followed those instructions.

Q. Now after you had followed the instructions of Lieb, Dooley and Warrington, Branch A, for example, you then left as you finished that branch, a certain sized ditch a certain cross section?

113 A. Yes, sir.

I cannot tell you how many yards I took out of Branch A. I don't know as I ascertained the number of yardage I was entitled to in Branch A.

Q. You do not really claim now that you are entitled to any more money for the excavation of A than the original contract called for?

A. No.

Q. You do know if you get the balance of these warrants you are now claiming you will be paid for some 3599 cubic yards on Branch A?

A. Believe that is it.

Q. You are now claiming to get 28 cents a yard for 3599 cubic yards in Branch A?

A. Yes, sir.

Q. And want it in this suit?

A. Yes—

Q. And expect these Plaintiffs and other tax payers to pay you for this yardage?

A. Yes, sir.

I was called up here from Rockwell City by telephone communication. Dooley phoned me. He said they had some work to let and to come up. I did not see it advertised in the newspaper. Did not ask why I was especially favored by such attention. The Board had never telephoned me prior to that time. That was the first time and the last time. I did not go to look at the ditch. I could guess about how much yardage would have to be excavated in that particular portion of the ditch whether high or low. I had finished the original construction of Branch A probably three years before. Had been on the ditch probably the spring before. I

114 had a talk with Warrington regarding the character of the work. He told me it would be from Station 70 to Station 105 on the upper end of the main. On the lower end I think it was 230 stations. Don't remember of having any talk with him in regard to Branch A at that time. Don't believe I got any plats or profiles in the Auditor's office to look the work over and see what it looked like. I knew he had made a report. Think the report was there at the time of the letting. Did not read it. I asked Warrington what the correct yardage was involved in the ditch. I don't remember now the yardage he told me. I read the contract before signing. George Day drew the contract. I couldn't say whether I read the report or not before signing the contract. All the work I ever did on 29 was in Branch A. Since June, 1911, I have taken jobs of recleaning in drainage District No. 37, District 35, between Pocahontas and Calhoun, Rush Lake District in Sac County and three different jobs in District No. 1, Buena Vista County. I got 30 cents in District No. 1. In Rush Lake I got 25 and in 37 I got 22 or 23. There was a little variation in the ditches. I figured that the work in Branch A would be what Warrington told me and what the report showed and what the contract showed. I did not know what Warrington's plans were in June, 1911, for excavation of Branch A. Never found out. I did not consult my contract to see what yardage I would have to dig out of Branch A. I don't remember just what the contract does say in regard to A.

Q. Will you refresh your recollection from the contract Exhibit "X" and state if the yardage you were to take out of Branch A was 936 yards.

A. Yes, I remember seeing that in the contract.

Q. But you are now claiming for just one yard less than 3600 yards; practically four times the amount contemplated taking out when the contract was made, are you not?

115 A. Yes, sir.

Q. So at the time you made contract there was about 936 yards necessary to be taken out in order to put it in original shape?

A. Yes, sir.

Q. What happened after you made that contract between that time and the time you dug the ditch to make it necessary to dig four times as much yardage out of the ditch to put it in the condition it was in originally?

A. Conditions of the soil.

Q. What were they?

A. The ditch was, as I said before, filled up but it was a soft marshy soil and in order to make the ditch stand that it had to be dug wider and we dug it deeper, so if it filled any we would still retain our grade.

This additional size I gave to Branch A was the sole solicitation of Mr. Dooley. He was the only one that had me do anything extra. He was on the job very frequently. We had nicely got started and he came and said we were leaving the ditch too straight. Wanted the banks sloped. I thought he was right, the banks

needed sloping, so we sloped them. I really trusted my own judgment in making this additional excavation regardless of Warrington's instructions. I felt that I should do all in my power to make a good ditch. I figured I would naturally be paid for what I did and figured to make as good a ditch as possible. When I first dug Branch A I dug an average depth of three feet. The bottom was originally planned to be four. The side banks had a slope of one and one-half to one. The only information I have as to
116 how much yardage I was allowed for all this work is from the reports of the engineer. I am not able to say independently of Warrington's reports how many yards he found upon measurement, I had removed from the upper part of the work or how many yards from the lower part of the work except as he reports. I had no conversation with the engineer in regard to the Calhoun County outlet.

Q. I show you Exhibit "P", consisting of three sheets purporting to be three separate estimates on your contract on District No. 29. Those are the estimates, except the final estimate of Mr. Warrington, are they not the original estimates?

A. They probably are.

Q. And the last sheet of this bunch of papers marked Exhibit "H", is the final certificate of the engineer under the same work?

A. Yes.

Q. Now I call your attention to the memorandum on Exhibit "P"; take the first sheet, shows in Warrington's handwriting the amount of the first estimate, amount of the second estimate, and amount of the third estimate. Memorandum indicating the completion of the contract?

A. Yes, sir.

Q. And the figures are figures as to yardage which you relied on?

A. I think they are.

Q. The second sheet was a certain number of yards of excavation, made between certain dates, July 1, and August 23, 1911?

A. Yes.

Q. And the third sheet shows the amount of excavation made from August 23, to December 16, 1911?

117 A. Yes.

Q. And the third sheet calculates the amount of yardage excavated; that the estimate for the work done August 23, to December 16, 1911, is, according to Mr. Warrington's own memorandum on original estimates, made to cover your work on Stations 0 to 23 and the outlet in Calhoun County?

A. It is there—I don't remember seeing it before.

I couldn't say just the time I dug this outlet in Calhoun County. I did the work during the time the work was done between stations 0 and 115. Was given an estimate of 11000 yards of excavation from Stations 0 to 115. Station 0 began at the extreme end of the ditch as originally built. If anything was added to the estimate from 0 to 115, it would necessarily include that beyond 0, or the new ditch. I know that I got an estimate that covered more than between Stations 0 and 115. Any work I did below Station 0 was in

not reeleaning but reconstruction work. I personally received those identical estimates marked Exhibit "P," from Warrington and filed them as evidence on which I was entitled to warrants. When I got the warrants from the Auditor I got them because of presenting these estimates. I had no right to be paid for work outside of the County. I dug that outlet below Station 0 about two feet deep, twenty feet wide, two hundred fifty feet long. It was a benefit to the ditch. I had two men, two days on that job. 389 yards of excavation there would be something like \$100.00 for that two days work. Two men, and two teams are worth about \$10. Twenty dollars for two days' work. I started this work of reeleaning before Thomas had finished Branch B. The work of redigging, I did the upper end of the ditch first; next, the lower main; Branch A last.

118 I finished it all within a year from the time I began. Did the work with one machine, three men, including myself. Did not do the work during the winter time. Continuous working, it took about nine months, of twenty-five days a month. I should think I put in two hundred to two hundred twenty-five days in the contract. The daily expense would run around \$20 a day. The machine cost \$2000. With the exceptions of the slope I took out all the dirt on Branch A, with the machine the second time. Worked with scrapers and team on one side of Branch A. I did not pay any attention at the letting to any of the bidding. Did not know who bid. I saw Thomas and there was stranger or two in the Board of Supervisor's office, but I did not know them. I was on perfectly friendly terms with the Board. Lived in Fonda part of the time. Dooley lived there.

Redirect examination:

I have previously done work for this Board and for Mr. Warrington. Those relations have been agreeable. Never had any trouble or dispute with the Board about settling up any of the contracts. Mr. Warrington had charge of a great deal of ditch work in this County. I have worked under him taking contracts where he had made the specifications before this. Found these specifications approximately correct in the previous work done. The first estimate was for \$3,080, second estimate \$2,040.30, third estimate \$5,417.72. Total amount \$10,538.00. I did not ask any one to pay me for the work I did in Calhoun County. I did not at any time ask Mr. Warrington or other person to compute the amount of yardage

119 done in Calhoun County. The work I did on this particular ditch and Branch A was reasonably necessary in order that the ditch itself should be preserved.

Further cross-examination:

Q. If you had taken out 40,000 more yards it would have helped? The bigger you make them the longer they will stay open?

A. Yes, sir.

I did not check up the work on Branch A in the second construction. Did not check up between Station 0 and 115 and in Calhoun.

I do not know whether I ever figured up Branch A or not on the second construction.

Further direct examination:

I could not tell without measuring the amount of work so as to know approximately as to whether the engineer is treating me fairly or not.

Exhibit "X," contract introduced by the Defendants as part of the examination of the witness, Hiatt, is as follows:

Auditor's office, Pocahontas, Iowa, Tuesday, June 8, 1911.

W. B. Warrington, engineer, having filed a report on March 6, 1911, recommending that the open work in Drainage Improvement District No. 29 should be cleaned and it appearing to the Board of Supervisors that it is expedient that said drainage improvement should be reopened and cleared and otherwise repaired for the better service of the lands tributary thereto and the lands having contributed toward the construction thereof and the Board of Supervisors having examined the report of W. B. Warrington, engineer as filed by him on March 6, 1911, and having carefully considered the matter, it hereby finds and determined that the cleaning, reopening, and repairing of said improvement will be for the best interests of the public rights affected thereby. Therefore, said engineer's report is hereby approved and the said improvement ordered to be cleaned, reopened, and repaired in accordance therewith.

On motion, S. F. Hiatt was employed to do the work of cleaning, reopening, and repairing said open work in Drainage District No. 29 as specified in the engineer's report at the price of thirty cents per cubic yard for the upper end approximately about 7317 cubic yards and the lower end at twenty-eight cents per cubic yard approximately 36,104 cubic yards and the Chairman of the Board of Supervisors and the County Auditor are hereby authorized to enter into contract with the said S. F. Hiatt for the performance of said work.

Contract of S. F. Hiatt.

This agreement made in duplicate and entered into this 9th day of June, 1911, by and between Pocahontas County, Iowa, and the Board of Supervisors of Pocahontas County, Iowa, in behalf of Drainage Improvement District No. 29 acting through the Chairman of the Board of Supervisors and the County Auditor of Pocahontas County, Iowa, party of the first part and S. F. Hiatt of Rockwell City, Iowa, party of the second part, witnesseth:

Whereas by resolution of the Board of Supervisors of Pocahontas County; S. F. Hiatt has been employed to do the work of cleaning out and repairing certain portions of said drainage improvement District No. 29 and the Chairman of the

Board of Supervisors and the County Auditor of said County were authorized to execute contracts with the said S. F. Hiatt for said work.

Now therefore it is agreed as follows, to wit:

Party of the second part hereby agrees to deepen, clean, reopen and repair said Drainage District No. 29 from Station Zero to Station 37 in the manner and to the proportionate depth and width as specified in the report of W. B. Warrington, filed March 6, 1911, and from Sta. 37 to Sta. 87, from Sta. 87 to Sta. 170, from Sta. 170 to Sta. 250, the above approximating about 35168 cubic yards herein called the lower end of said drainage district, also in addition to the above mentioned work in the lower end of said district, second party agrees to clean, reopen and repair Branch "A" of said district from Sta. Zero to Sta. 23 as specified in the engineer's report approximating about 936 cubic yards in said Branch "A," the same to be done as part of the lower end of said district, and to clean, reopen, deepen and repair said drainage improvement from Sta. 402 to Sta. 500 as specified in said engineer's report and approximating about 7317 cubic yards, and herein called the upper end of said district, agreeing to clean, reopen, and deepen said improvement according as the same is specified by said engineer's report, and agreeing that no material removed in the cleaning, reopening and repairing shall be deposited on the inside of the present banks of said improvement, the party of the second part to furnish all labor and material used in said repairing, reopening, and cleaning, to do all work in a good workmanlike manner and to be governed in the performance of his part of said contract by the provisions of the Acts of the 30th G. A. Chapter 68 and all acts amendatory thereto relative to the construction of drainage improvement, and to be subject to all conditions thereto relative to the construction of drainage improvement, and to be subject to all conditions as therein contained, except as may be herein expressly waived, agreeing to begin work as early as is convenient, and practicable, having in mind the proper and skillful construction of said improvement, to begin the work not later than July 1st, 1911, and to complete the same on or before July 1st, 1912.

Party of the second part agrees to reopen, repair and clean said improvement under the supervision of the engineer in charge, to use all possible precaution in the prosecution of said contract, to do as little damage to the farms or land through which said improvement shall pass as the nature of the work will permit, second party agreeing that all claims for material furnished and labor performed shall be paid and satisfied in full and proper receipts and vouchers furnished therefor, or such other satisfactory evidence of the payment of the same as the Board may require before the acceptance and final payment by the party of the first part.

It is further understood and agreed by and between the parties hereto that where the proposed drainage improvement shall pass any public highway the second party shall take all precaution to prevent accidents occurring to the public and shall protect all excavation with proper signals and warnings, second party to be responsible for all

123 damages resulting from his negligence in failing to guard the work, either on the public highway or any where else along the course of said proposed ditch.

It is further agreed that the party of the first part shall not be responsible for delay, loss or damage not directly caused by the express official orders of the said party of the first part made after the execution hereof, not for the actions or omissions of any person in the employ of the party of the first part or in case of injunction suit being brought, or if, for any unavoidable cause, it shall become necessary to stop the work provided for herein, the party of the first part shall be in no wise liable for any loss or damage caused by such delay, and the time within which said work is to be completed shall be extended for the full time of the delay occasioned by said suit if any be brought, provided, however, that said suit is not based directly or indirectly on or caused by the negligence or other act of said second party, his agents or servants.

It is further understood and agreed that the date of commencing and completion of said work herein provided for shall be construed as of the essence of this contract.

In consideration of the foregoing the party of the first part hereby agrees to pay said party of the second part in full for all services performed in pursuance of this contract, the sum of twenty-eight (28 cts.) cents per cubic yard for all excavations or dirt removed from the lower end of said district approximating according to the engineer's report, 36104 cubic yards which includes the work on Branch "A" of said district and Thirty (30) cents per cubic yard for the work in the upper end of said district approximating according to said engineer's report, 7317 cubic yards, all sums of money due the party of the second part for material furnished or labor performed to be paid by the party of the first part in warrants upon the Drainage funds of said District No. 29, or in Drainage Improvement Certificates at the election of party of the first part, the same to be paid in all cases according to the provisions of the Acts of the 30th G. A., Chapter 68, and Acts supplemental and amendatory thereto relative to the payment of said claims, both parties to be governed in these premises by the provisions of the Acts of the 30th G. A., Chapter 68, and Acts supplementary and amendatory thereto relative to the construction and acceptance of said work, penalties and payments and all other matters therein pertinent to the construction of said improvement as may be herein expressly or otherwise agreed upon.

It is further understood that should the sections of said improvement herein described be not completed within the time limited herein, the liquidated damages shall be and they are hereby stipulated to be Ten Dollars for each and every day that said portion of said work shall remain unfinished from and after the time set for the completion, which sum shall be taken and accepted as liquidated damages to recompense party of the first part for the failure and breach of said portion of this contract to complete said sections within the time above prescribed, and an action at law may be maintained by the party of the first part against the party of the second part or

his bondsmen or both, at the election of party of the first part for the recovery of such liquidated damages.

To all of which both parties hereunto agree.

125 Witness our hands and the seal of said county, this 9th day of June, 1911.

M. J. DOOLEY,

Chairman Board of Supervisors.

J. A. TERRY,

County Auditor. [SEAL.]

S. F. HIATT,
Contractor.

G. P. SMITH testified on behalf of Defendants, as follows:

My business is a civil engineer. Experience seven or eight years. During that time has been largely that of drainage work in north-western Iowa. Have observed drainage ditches often. I have looked over drainage district 29 in Pocahontas County. In July and August, 1908, made survey of the entire district and again in October, 1912, made two examinations of the district. Survey in 1908 was made for the purpose of platting the drainage district. The district had already been established and partly constructed but I think that it was decided that the surveys were not sufficient, did not furnish sufficient data for the work and at that time I made the survey over. In 1912 I was employed by Mr. Allen in an assessment appeal of the district. I examined the district at that time so specifically as to be able to testify as to what would be proper assessments, especially in the Allen case. In making that examination I divided the district into different elements or Branches. I discovered how much the land tributary to each of these branches had in fact paid under the assessment which was levied in the district.

126 Exhibit "W," which has just been identified by the reporter shows the results of my investigation as to what the cost of each branch was and as to what amount was raised on each branch. In estimating the cost of each branch where the contract did not show the cost of separate lines the tile contract was divided between different lines in direct proportion to the engineer's estimate and to the cost of the open work were added damages as allowed for each particular branch. The ink items on this Exhibit "W" shows the actual cost of constructing the branch plus the 5.2% which was the percentage raised in this district for expense. That was what was called overhead charge. The overhead charge is the difference between the contract price and the damages, and the total assessment. I found the main was filled up somewhat at the time of my first examination in 1908. Branch A was then under construction. The fall on the lower portion of the main drain and on Branch A was very flat. Above the Illinois Central railroad crossing or thereabout on the main the fall is then steep or greater for two or three miles until the line nears the large sloughs located in the upper portion of the district. The upper portion of the drain is flat again. Branch

B has a greater fall than the main below the outlets of Branch B. In order to get the benefit of Branch B and preserve the usefulness of Branch B it will be necessary to keep the main reasonably free from silt. I am familiar with the method of digging such ditches and the method of cleaning them out. An orange peel bucket cannot be operated on hard soil. I would say the fair and reasonable price for cleanout work in a ditch, such as this, along the main and also along Branch A, would be from twenty-five or six to thirty or thirty-one cents. I have made some investigation about the costs of cleanouts.

127 Cross-examination:

I do not believe in paying a certain price, if not excessive, if I can get the work done for less. I have not had charge of cleanout work. I am familiar with several jobs but have not had charge. I surveyed this district 29 for the benefit commission—The Parsons commission. The lands of all of these Plaintiffs, except one, is in the area served by Branch B. My classification follows closely the Parsons commission.

Q. Now, Mr. Smith, if your method of classification had been followed in this district, all the land would be assessed for its proportionate cost of the main.

A. Yes, sir.

Q. Then the lands served by independent laterals or by laterals would also be assessed for its proportionate cost of that lateral?

A. Yes, sir.

Q. And if that method had been followed, cleanout of the main ditch would have spread necessarily in the same proportion as the original cost of that main ditch?

A. I presume so, if it were of record.

In this particular case the final assessment was made by what was called the Skeels commission. The Skeels commission lumped the costs and damages for the entire district in one lump sum and spread it over the entire ditch as one unit, without reference to and served by various laterals. I recall from my investigation that the cost of Branch B itself is a considerable sum in proportion to the area served by it.

Q. Now, if the proper owners in that area had been assessed a sum in proportion to the rest of the district as one lump sum and are assessed now in accordance with the original assessment in proportion to that for the cost and cleanout, they may get excessive assessments, in proportion to the benefits from the cleanout itself, and so may the property owners in every special drainage area served by an expensive tile. Is that correct?

A. If they had originally paid in proportion to the cost of their tile line and now paid on a basis of the original assessment, which was practical for a tile line, they would of course pay for the cleanout in proportion to the cost of their tile line, and the main together. And if their tile line were more expensive, would make the cleanout tax heavier.

As I remember, Branch "B" or "A" was being constructed originally when I first saw it. It was a small open ditch three or four feet bottom. I have not seen the ditch excavated after it was reconstructed. It is my opinion that the entire basis of the Skeels assessment was incorrect.

M. J. DOOLEY testified for the Defendants as follows:

I am a member of the Board of Supervisors of this County. Have been for many years. Was a member of the Board at the time district No. 29 was first built and have been ever since. My home is at Fonda and this ditch is down in my district. After the ditch was built, especially after Branch A was built and just previous to the time I met Mr. Hiatt and made a contract with him for the cleanout, Branch A was in pretty bad shape. The ditch was pretty well filled. Wasn't full of course, but badly filled and the 129 banks were ragged and overhanging. I was there a couple of times on Branch A when they were working at the cleanout. The overhanging banks were scraped off and cleaned away.

Q. Did you—were you present when Sam Hiatt took the cleanout contract?

A. Yes, sir.

Q. Tell us about that with reference to what happened that day and what led to the making of the contract. Did you have Hiatt present for the purpose of submitting offers to the Board on the cleanout?

A. Yes. I think I phoned him to come up, that the boys wanted to see him; but in the meantime the engineer had made report that the ditch was in bad shape and needed cleaning and Sam Hiatt, I understood, was doing some work in Calhoun County, and I think I phoned him to come up and meet the Board in session such and such a day and he came and we told him what we wanted done.

Q. And he made you a bid on the work?

A. Yes, sir. Said he would take the contract for 30 cents per yard.

We explained to him that the lower end had a big yardage and we ought to get it done cheaper and finally agreed on 28 cents for that and 30 cents for the upper end. I engaged in that conversation and the Board did. Thomas had a boat on the ditch. His boat was on the upper end of the old ditch, and we tried to get him to clean up the upper end or the old ditch. He said he would clean up the upper end down to what we called the Samuelson cut in the ditch. Said his boom was not long enough to do it. He offered to clean it down to that for \$2,000. Previous to the time of the the agreement 130 with Hiatt for the cleanout, I had talked with members of the Board of Calhoun County about him. He was recommended by the Calhoun County Board as a good man for that kind of work. He was working on the job, I think, ten days after the date of the letting.

Cross-examination:

Q. I call your attention to report under date of Nov. 11, 1910, found among the papers of Exhibit "H." Mr. Warrington called your attention to the main ditch in 29 filled to such an extent as to cause Branch A to fill and "I recommend that you have it cleaned. Think Branch A should be cleaned from Station 0 to 23 and the main ditch from Station 0 to 90. There will be 500 cubic yards in Branch A and 1,000 in the main."

A. I think the Board sent him out later to investigate the entire ditch and he made another report.

Q. Why didn't you act in November, 1910?

A. It was late in the season.

Q. You could have advertised for bids and got competition?

A. Yes, sir. The Board had not taken up the matter of cleaning of the ditch particularly until the spring of 1911.

The assessment was not made or confirmed for the first ditch until November, 1911.

Q. You appreciated the fact that the contract you were going to make with Hiatt, involved the sum of ten thousand dollars or more?

A. Yes, sir.

Q. It seemed like an important contract, didn't it, Mr. Dooley?

A. Very much so.

131 Q. Who else did you telephone, besides Hiatt?

A. Nobody.

Q. He was the only one you invited, was he?

A. The only one.

Q. He lived in the same town you did?

A. He wasn't living there then—he had lived there, yes.

Q. And you personally telephoned him at Rockwell City?

A. I think so—I don't know. I may have wrote to him. I did it by request of the Board. I was chairman.

Q. You passed no resolution, directing you to call up? Just talked it over with them, and they said it would be agreeable to do that?

A. Yes, sir.

Q. That is all.

The following is Exhibit from drainage assessment record No. 1, pages 171 to 178 inclusive, showing original assessment and reassessment for recleaning in drainage district No. 29, as testified to by the witness, Day, and the witness, O'Donnel.

Description.	Sec., twp., range.	No. points.	Amount.	1912.
SE $\frac{1}{4}$ SE $\frac{1}{4}$	32-91-33	65	\$25.61	\$3.37
SW $\frac{1}{4}$ SE $\frac{1}{4}$	33-91-33	40	15.76	2.07
NE $\frac{1}{4}$ NW $\frac{1}{4}$	4-90-33	110	43.34	3.96
SE $\frac{1}{4}$ NW $\frac{1}{4}$	4-90-33	360	141.84	27.16
NW $\frac{1}{4}$ NW $\frac{1}{4}$	4-90-33	450	177.30	33.96
SW $\frac{1}{4}$ NW $\frac{1}{4}$	4-90-33	1,365	462.81	88.65
NE $\frac{1}{4}$ SW $\frac{1}{4}$	4-90-33	30	11.82	2.23

Description.	Sec., twp., range.	No. points.	Amount.	1912.
NW $\frac{1}{4}$ SW $\frac{1}{4}$	4-90-33	1,170	360.98	69.15
SW $\frac{1}{4}$ SW $\frac{1}{4}$	4-90-33	1,140	349.16	66.86
SE $\frac{1}{4}$ SW $\frac{1}{4}$	5-90-33	30	11.82	2.23
NE $\frac{1}{4}$ NE $\frac{1}{4}$	5-90-33	325	128.05	16.85
132				
SE $\frac{1}{4}$ NE $\frac{1}{4}$	5-90-33	1,400	500.60	65.85
NW $\frac{1}{4}$ NE $\frac{1}{4}$	5-90-33	812	319.93	42.10
SW $\frac{1}{4}$ NE $\frac{1}{4}$	5-90-33	1,800	609.20	80.15
NE $\frac{1}{4}$ NW $\frac{1}{4}$	5-90-33	616	200.70	26.40
NW $\frac{1}{4}$ NW $\frac{1}{4}$	5-90-33	75	29.55	3.86
SW $\frac{1}{4}$ NW $\frac{1}{4}$	5-90-33	330	100.02	13.14
SE $\frac{1}{4}$ NW $\frac{1}{4}$	5-90-33	800	265.20	34.88
NE $\frac{1}{4}$ SW $\frac{1}{4}$	5-90-33	100	300.00	39.42
NW $\frac{1}{4}$ SW $\frac{1}{4}$	5-90-33	585	124.60	16.37
SW $\frac{1}{4}$ SW $\frac{1}{4}$	5-90-33	1,520	323.76	42.58
SE $\frac{1}{4}$ SW $\frac{1}{4}$	5-90-33	780	307.32	40.42
NE $\frac{1}{4}$ SE $\frac{1}{4}$	5-90-33	3,900	1,200.60	157.97
NW $\frac{1}{4}$ SE $\frac{1}{4}$	5-90-33	2,730	800.62	105.34
SW $\frac{1}{4}$ SE $\frac{1}{4}$	5-90-33	2,775	893.35	117.54
SE $\frac{1}{4}$ SE $\frac{1}{4}$	5-90-33	2,730	900.62	118.50
NE $\frac{1}{4}$ SE $\frac{1}{4}$	6-90-33	285	60.71	7.96
SW $\frac{1}{4}$ SE $\frac{1}{4}$	6-90-33	238	50.69	6.65
SE $\frac{1}{4}$ SE $\frac{1}{4}$	6-90-33	555	118.22	15.53
NE $\frac{1}{4}$ NE $\frac{1}{4}$	7-90-33	1,710	464.23	61.07
NW $\frac{1}{4}$ NE $\frac{1}{4}$	7-90-33	870	185.31	24.36
SW $\frac{1}{4}$ NE $\frac{1}{4}$	7-90-33	450	95.85	12.58
SE $\frac{1}{4}$ NE $\frac{1}{4}$	7-90-33	1,170	299.21	39.35
NE $\frac{1}{4}$ NE $\frac{1}{4}$	8-90-33	380	149.72	19.68
NW $\frac{1}{4}$ NE $\frac{1}{4}$	8-90-33	2,660	848.04	111.58
SW $\frac{1}{4}$ NE $\frac{1}{4}$	8-90-33	1,755	600.47	79.00
SE $\frac{1}{4}$ NE $\frac{1}{4}$	8-90-33	585	230.49	30.31
NE $\frac{1}{4}$ SE $\frac{1}{4}$	8-90-33	1,755	403.82	53.12
NE $\frac{1}{4}$ NW $\frac{1}{4}$	8-90-33	1,520	500.88	95.92
NW $\frac{1}{4}$ NW $\frac{1}{4}$	8-90-33	1,330	283.29	54.20
SE $\frac{1}{4}$ NW $\frac{1}{4}$	8-90-33	780	307.32	48.80
SW $\frac{1}{4}$ NW $\frac{1}{4}$	8-90-33	1,170	249.21	32.77
NW $\frac{1}{4}$ SW $\frac{1}{4}$	8-90-33	1,365	290.74	38.24
SW $\frac{1}{4}$ SW $\frac{1}{4}$	8-90-33	760	161.88	21.30
133				
NE $\frac{1}{4}$ SW $\frac{1}{4}$	8-90-33	3,900	767.83	178.30
SE $\frac{1}{4}$ SW $\frac{1}{4}$	8-90-33	3,800	733.76	81.44
NW $\frac{1}{4}$ SE $\frac{1}{4}$	8-90-33	2,925	571.75	132.76
SW $\frac{1}{4}$ SE $\frac{1}{4}$	8-90-33	3,800	742.00	172.30
SE $\frac{1}{4}$ SE $\frac{1}{4}$	8-90-33	3,230	633.60	147.11
NW $\frac{1}{4}$ NW $\frac{1}{4}$	9-90-33	390	153.66	20.20
SW $\frac{1}{4}$ NW $\frac{1}{4}$	9-90-33	585	180.49	23.73
SE $\frac{1}{4}$ NW $\frac{1}{4}$	9-90-33	300	118.20	22.62

Description.	Sec., twp., range.	No. points.	Amount.	1912
NE $\frac{1}{4}$ SW $\frac{1}{4}$	9-90-33	540	115.02	15.11
SE $\frac{1}{4}$ SW $\frac{1}{4}$	9-90-33	660	140.58	18.62
NW $\frac{1}{4}$ SW $\frac{1}{4}$	9-90-33	584	124.60	16.37
SW $\frac{1}{4}$ SW $\frac{1}{4}$	9-90-33	760	161.88	21.30
NE $\frac{1}{4}$ NW $\frac{1}{4}$	16-90-33	112	23.86	3.08
NW $\frac{1}{4}$ NW $\frac{1}{4}$	16-90-33	230	48.99	6.58
SW $\frac{1}{4}$ NW $\frac{1}{4}$	16-90-33	200	52.59	6.90
NE $\frac{1}{4}$ SW $\frac{1}{4}$	16-90-33	480	262.08	50.18
NW $\frac{1}{4}$ SW $\frac{1}{4}$	16-90-33	780	385.92	73.91
SW $\frac{1}{4}$ SW $\frac{1}{4}$	16-90-33	1,520	829.92	159.06
SE $\frac{1}{4}$ SW $\frac{1}{4}$	16-90-33	2,730	1,490.58	285.57
NW $\frac{1}{4}$ SE $\frac{1}{4}$	16-90-33	150	81.90	15.66
SW $\frac{1}{4}$ SE $\frac{1}{4}$	16-90-33	875	477.75	91.51
SE $\frac{1}{4}$ SE $\frac{1}{4}$	16-90-33	30	16.38	3.08
NE $\frac{1}{4}$ NE $\frac{1}{4}$	17-90-33	1,140	262.82	50.25
NW $\frac{1}{4}$ NE $\frac{1}{4}$	17-90-33	3,510	827.63	158.53
SW $\frac{1}{4}$ NE $\frac{1}{4}$	17-90-33	800	170.40	32.62
SE $\frac{1}{4}$ NE $\frac{1}{4}$	17-90-33	780	166.14	31.77
NE $\frac{1}{4}$ SE $\frac{1}{4}$	17-90-33	780	166.14	31.77
NW $\frac{1}{4}$ SE $\frac{1}{4}$	17-90-33	800	170.40	32.62
SW $\frac{1}{4}$ SE $\frac{1}{4}$	17-90-33	585	199.53	35.20
SE $\frac{1}{4}$ SE $\frac{1}{4}$	17-90-33	1,140	502.56	96.26
NE $\frac{1}{4}$ NW $\frac{1}{4}$	17-90-33	2,405	562.26	73.97
NW $\frac{1}{4}$ NW $\frac{1}{4}$	17-90-33	925	197.03	25.90
SW $\frac{1}{4}$ NW $\frac{1}{4}$	17-90-33	555	118.22	15.53
134				
SE $\frac{1}{4}$ NW $\frac{1}{4}$	17-90-33	600	127.80	16.83
NE $\frac{1}{4}$ SW $\frac{1}{4}$	17-90-33	600	127.80	16.83
NW $\frac{1}{4}$ SW $\frac{1}{4}$	17-90-33	780	166.14	21.81
SW $\frac{1}{4}$ SW $\frac{1}{4}$	17-90-33	555	118.22	15.53
SE $\frac{1}{4}$ SW $\frac{1}{4}$	17-90-33	585	124.60	16.37
NE $\frac{1}{4}$ NE $\frac{1}{4}$	18-90-33	1,140	242.82	31.93
SW $\frac{1}{4}$ NE $\frac{1}{4}$	18-90-33	100	21.30	280.00
SE $\frac{1}{4}$ NE $\frac{1}{4}$	18-90-33	780	166.14	21.81
NE $\frac{1}{4}$ SW $\frac{1}{4}$	18-90-33	400	85.20	16.31
NW $\frac{1}{4}$ SW $\frac{1}{4}$	18-90-33	250	53.25	1,000.19
SW $\frac{1}{4}$ SW $\frac{1}{4}$	18-90-33	1,000	213.00	40.78
SE $\frac{1}{4}$ SW $\frac{1}{4}$	18-90-33	925	197.03	37.72
NE $\frac{1}{4}$ SE $\frac{1}{4}$	18-90-33	1,850	300.05	39.42
NW $\frac{1}{4}$ SE $\frac{1}{4}$	18-90-33	600	127.80	16.83
SW $\frac{1}{4}$ SE $\frac{1}{4}$	18-90-33	925	197.03	25.90
SE $\frac{1}{4}$ SE $\frac{1}{4}$	18-90-33	950	202.35	26.60
NE $\frac{1}{4}$ NE $\frac{1}{4}$	19-90-33	760	202.36	26.60
NW $\frac{1}{4}$ NE $\frac{1}{4}$	19-90-33	780	236.98	31.25
SW $\frac{1}{4}$ NE $\frac{1}{4}$	19-90-33	1,200	584.20	76.86
SE $\frac{1}{4}$ NE $\frac{1}{4}$	19-90-33	780	388.48	51.10
NE $\frac{1}{4}$ NW $\frac{1}{4}$	19-90-33	390	128.61	16.92
SE NW	19-90-33	400	171.22	22.51

Description.	Sec., twp., range.	No. points.	Amount.	1912.
NW NW	19-90-33	675	143.78	18.92
SW NW	19-90-33	714	152.08	20.00
NE SW	19-90-33	1,000	506.00	66.56
NW SW	19-90-33	1,200	407.40	2.05
SW SW	19-90-33	1,338	471.71	14.90
SE SW	19-90-33	780	403.48	53.15
NE SE	19-90-33	1,560	751.96	98.93
NW SE	19-90-33	1,400	672.40	88.46
SW SE	19-90-33	780	403.48	53.15
135				
SE SE	19-90-33	760	394.16	51.85
NE NE	20-90-33	1,330	726.18	95.54
SW NE	20-90-33	800	396.80	52.20
SE NE	20-90-33	975	532.35	101.97
NW NE	20-90-33	390	197.74	26.00
NE NW	20-90-33	390	148.85	19.56
NW NW	20-90-33	380	118.89	15.66
SW NW	20-90-33	780	363.48	69.61
SE NW	20-90-33	2,200	775.20	148.51
NE SW	20-90-33	800	376.80	49.56
NW SW	20-90-33	1,170	525.22	69.10
SW SW	20-90-33	570	200.22	38.31
SE SW	20-90-33	975	432.35	82.80
NE SE	20-90-33	1,755	958.23	188.85
NW SE	20-90-33	600	327.60	62.75
N 10A SW SE	20-90-33	150	81.90	15.66
N 10A SE SE	20-90-33	700	382.20	73.21
SP & SW SE	20-90-33	1,305	600.53	79.00
SP & SE SE	20-90-33	700	382.20	50.28
NE NW	21-90-33	1,020	556.92	106.68
NW NW	21-90-33	570	311.22	59.60
SW NW	21-90-33	340	185.64	35.54
SE NW	21-90-33	150	81.90	15.66
NW SW	21-90-33	190	103.74	19.85
SW SW	21-90-33	90	49.14	9.39
NW NE	29-90-33	180	98.28	17.00
			331.00	
NE NW	29-90-33	760	414.96	79.49
			131.32	
NW NW	29-90-33	570	164.22	31.45
			242.40	
SW NW	29-90-33	555	303.03	58.03
			190.00	
136				
SE NW	29-90-33	435	237.51	44.48
NW SW	29-90-33	290	158.34	30.30
SW SW	29-90-33	420	229.32	43.90
NE NE	30-90-33	570	311.22	40.93

Description.	Sec., twp., range.	No. points.	Amount.	1912.
SE NE	30-90-33	1,665	909.09	119.55
NW NE	30-90-33	780	425.88	56.02
SW NE	30-90-33	1,000	546.00	71.84
NE NW	30-90-33	975	207.68	39.77
SE NW	30-90-33	800	210.36	40.30
NW NW	30-90-33	1,505	320.57	42.20
SW NW	30-90-33	1,335	284.36	37.42
NE SW	30-90-33	800	316.92	41.70
NW SW	30-90-33	1,335	284.36	37.42
SW SW	30-90-33	1,085	342.66	45.07
SE SW	30-90-33	1,365	687.02	90.40
NE SE	30-90-33	760	414.96	54.60
NW SE	30-90-33	1,600	873.60	167.35
SW SE	30-90-33	1,710	933.66	178.86
SE SE	30-90-33	1,900	1,037.40	136.50
Lot 1	31-90-33	660	360.36	47.40
Lot 2	31-90-33	1,540	840.84	110.63
Lot 3	31-90-33	1,020	556.92	73.27
Lot 4	31-90-33	1,250	474.38	62.40
SW NE	31-90-33	25	533.00	.70
SWNW & NW NW	31-90-33	500	106.50	14.00
SE NW	31-90-33	800	170.40	22.61
NE SW	31-90-33	40	8.52	1.10
NW SW	31-90-33	440	93.72	12.31
SW SW	31-90-33	140	29.82	391.00
NW NW	32-90-33	188	102.65	13.48
NE SE	13-90-34	28	5.97	.80
SE SE	13-90-34	495	105.44	13.87
137				
NE SW	23-90-34	375	123.00	16.18
NW SW	23-90-34	975	219.80	28.90
Pt SW SW	23-90-34	870	285.36	37.55
Pt SW SW	23-90-34	270	88.56	11.63
SE SW	23-90-34	780	255.84	33.64
NE SE	23-90-34	50	16.40	2.13
NW SE	23-90-34	30	9.84	1.27
SW SE	23-90-34	1,170	383.76	50.50
SE SE	23-90-34	1,520	498.56	65.60
NE NE	24-90-34	1,295	275.84	36.28
NW NE	24-90-34	50	10.65	1.40
SW NE	24-90-34	1,200	255.60	33.62
SE NE	24-90-34	1,710	300.23	39.45
SE NW	24-90-34	250	23.25	3.02
NE SW	24-90-34	600	89.90	11.81
NW SW	24-90-34	680	123.04	16.18
SW SW	24-90-34	570	100.96	13.28
SE SW	24-90-34	780	188.84	24.85
NE SE	24-90-34	1,710	364.23	47.93

Description.	Sec., twp., range.	No. points.	Amount.	1912.
NW SE	24-90-34	1,000	213.00	28.00
SW SE	24-90-34	780	166.14	21.81
SE SE	24-90-34	1,365	290.74	38.25
NE NE	25-90-34	1,140	242.82	31.95
NW NE	25-90-34	975	207.68	27.32
SW NE	25-90-34	1,000	213.00	28.00
SE NE	25-90-34	780	166.14	21.81
NE NW	25-90-34	780	200.84	26.42
NW NW	25-90-34	950	386.60	50.85
SW NW	25-90-34	1,170	438.76	57.73
SE NW	25-90-34	600	146.80	19.30
NE SW	25-90-34	600	162.30	21.35
NW SW	25-90-34	1,170	383.76	50.50
SW NW	25-90-34	875	316.88	41.70
138				
SE SW	25-90-34	975	207.68	27.32
NE SE	25-90-34	780	166.14	21.81
NW SE	25-90-34	600	127.80	16.83
SW SE	25-90-34	1,170	249.21	32.74
SE SE	25-90-34	1,330	283.29	37.26
NE NE	26-90-34	1,140	373.92	49.20
NW NE	26-90-34	2,145	703.56	92.56
SW NE	26-90-34	1,560	511.68	67.31
SE NE	26-90-34	1,520	498.56	65.60
NE NW	26-90-34	1,710	560.88	73.91
N $\frac{1}{2}$ NW NW	26-90-34	648	212.54	27.96
S $\frac{1}{2}$ NW NW	26-90-34	682	223.70	29.41
SW NW	26-90-34	1,125	369.00	22.22
S $\frac{1}{2}$ SE NW	26-90-34	880	288.64	37.96
N $\frac{1}{2}$ SE NW	26-90-34	1,045	342.76	25.10
NE SW	26-90-34	1,170	433.76	57.06
NW SW	26-90-34	1,480	485.44	63.86
N Ry SW SW	26-90-34	45	14.76	1.93
S Ry SW SW	26-90-34	480	157.44	20.70
S Ry SE SW	26-90-34	375	123.00	16.18
N Ry SE SW	26-90-34	165	54.12	7.09
NE SE	26-90-34	1,710	560.88	73.91
NW SE	26-90-34	1,170	383.76	50.50
SW SE	26-90-34	1,800	590.40	77.67
SE SE	26-90-34	1,700	557.60	73.34
SE NE	33-90-34	170	36.21	4.76
NE SE	33-90-34	330	70.29	9.25
NW SE	33-90-34	15	3.20	.42
SW SE	33-90-34	50	10.65	1.40
SE SE	33-90-34	360	76.68	10.08
NE NE	34-90-34	540	202.12	26.57
NW NE	34-90-34	352	74.98	9.84
SW NE	34-90-34	390	83.07	10.93
S Ry SE NE	22.00	2.89

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Description.	Sec., twp., range.	No. points.	Amount.	1912.
SP & SE NE	34-90-34	489	102.86	15.52
NE NW	34-90-34	330	100.29	13.14
NW NW	34-90-34	130	31.95	4.20
SW NW	34-90-34	390	133.07	17.50
SE NW	34-90-34	540	165.02	21.70
NE SW	34-90-34	585	174.60	22.95
NW SW	34-90-34	720	199.36	26.22
SW SW	34-90-34	570	121.41	15.95
SE SW	34-90-34	570	121.41	15.95
NE SE	34-90-34	975	257.68	33.91
NW SE	34-90-34	585	124.60	16.37
SW SE	34-90-34	570	121.41	15.95
SE SE	34-90-34	570	171.41	22.51
NE NE	35-90-34	780	300.84	39.50
NW NE	35-90-34	585	191.88	25.25
SW NE	35-90-34	600	182.98	24.08
SE NE	35-90-34	400	96.70	12.72
NE NW	35-90-34	585	191.88	25.25
NW NW	35-90-34	570	186.96	24.60
SW NW	35-90-34	570	173.16	22.76
SE NW	35-90-34	570	135.21	17.47
NE SW	35-90-34	380	80.94	10.65
NW SW	35-90-34	501	146.71	19.30
SW SW	35-90-34	950	262.35	34.50
SE SW	35-90-34	373	79.45	10.43
NE SE	35-90-34	1,900	600.70	79.01
NW SE	35-90-34	925	300.03	39.42
SW SE	35-90-34	900	241.70	31.80
SE SE	35-90-34	1,560	550.28	72.40
N Ry NE NE	36-90-34	1,210	287.73	37.85
S Ry NE NE	36-90-34	605	168.87	22.20
S Ry NW NE	36-90-34	575	122.48	16.13

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N Ry NW NE	36-90-34	325	69.23	9.11
SW NE	36-90-34	800	170.40	22.61
SE NE	36-90-34	555	168.22	22.18
NE NW	36-90-34	540	115.02	15.11
NW NW	36-90-34	585	159.11	20.92
SW NW	36-90-34	400	85.20	11.20
SE NW	36-90-34	1,000	138.00	17.16
NE SW	36-90-34	950	252.35	33.18
NW SW	36-90-34	1,520	473.76	62.34
SW SW	36-90-34	1,560	550.28	72.40
SE SW	36-90-34	780	166.14	21.81
NE SE	36-90-34	975	207.68	27.32
SE SE	36-90-34	760	161.88	21.30
NW SE	36-90-34	925	197.03	25.92
SW SE	36-90-34	975	207.68	27.32

After said cause was fully submitted and argued in the District Court of Iowa, in and for Pocahontas County on the last day of the October, 1915, term of said Court, being the — day of October, 1915, the said Court took said case under advisement and on the 26th day of March, A. D. 1917, the Court duly rendered the following decree and judgment, to wit:

Be it remembered that, the above entitled causes coming on for trial and hearing in its regular order on this, the — day of October, 1915, the same being one of the days of the regular October, 1915, Term of said Court, the Honorable D. F. Coyle being the sole presiding judge, and the plaintiffs in each of said above entitled causes appearing in person and by their attorneys of record, T. F. Lynch and Kenyon, Kelleher, O'Connor & Price, and the defendants, Board of Supervisors of Pocahontas County, Iowa, W. P. Hopkins, 141 J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klien, members of the Board of Supervisors of Pocahontas County, Iowa, L. O'Donnell, as Auditor of Pocahontas County, Iowa, John Forbes, County Treasurer of Pocahontas County, Iowa, and Drainage District Number 29, appearing by their attorney of record, F. C. Gilchrist, and S. F. Hiatt and the Katz-Craig Contracting Company appearing by their attorney of record, Robert Healy, and evidence having been offered and introduced in support of the averments of plaintiffs' petition and of the issues herein tendered and joined, and by agreement of the parties hereto, made and entered of record, this cause was submitted to the Court, to be decided in vacation, as of the last day of the October, 1915, Term of the said Court; and now, on this 26th day of March, A. D. 1917, the Court, being fully advised in the premises, Finds and Determines as follows, to wit:

1. That Plaintiff's petitions, and all amendments thereto, are without equity.

2. The Court finds and determines that the equities of this cause are with the defendants.

3. That the defendant, Board of Supervisors, has complied with all of the requirements of law in reference to the cleaning of the ditch referred to in the Plaintiffs' petitions, and that the defendant, S. F. Hiatt, has complied with his contract, made with the defendant, Board of Supervisors, in reference to the cleaning of said ditch.

4. That there is now due and owing from said Drainage District to the defendant, S. F. Hiatt, for said work, as aforesaid, the sum of Eight Thousand, Two Hundred Sixteen and 48-100 Dollars (\$8,216.48).

142 It is therefore ordered, adjudged and decreed by the Court that the temporary writ of injunction heretofore issued in these causes is hereby dissolved and dismissed; that the petitions of the plaintiffs, and all amendments thereto, are hereby dismissed; that the defendants, Board of Supervisors, and the County Auditor of Pocahontas County, Iowa, are hereby authorized and instructed to immediately and forthwith comply with the terms of the contract heretofore made with the said S. F. Hiatt, as aforesaid,

and to pay the said S. F. Hiatt the sum of Eight Thousand, Two Hundred Sixteen and 48-100 Dollars (\$8,216.48).

All costs incurred herein, amounting to One Hundred Seventy-two and 72-100 dollars (\$172.72), are taxed to the plaintiffs.

There is reserved, however, to the plaintiffs, the right, at any time within six months from the filing of this decree, to petition this court to set aside this decree.

To each and all of the foregoing, the plaintiffs except.

D. F. COYLE,

Judge of the 14th Judicial District.

The said above judgment entry and decree was filed in the office of the Clerk of the District Court of Pocahontas County, Iowa, on April 18, 1917, and was duly entered and made of record, and said judgment and decree was made and entered of record on the said date.

Certificate.

On the 25th day of August, 1917, the plaintiffs duly perfected an appeal to the Supreme Court of the State of Iowa, and duly
143 served notice of appeal upon all the attorneys of record for the defendants, and upon W. E. Bollard, Clerk of the District Court of Pocahontas County, Iowa, and filed said notice with the Clerk of said Court. That said notice of appeal was in due form of law, and the said plaintiffs fully, and in all respects, perfected said appeal according to law.

The transcript and depositions and shorthand notes of the evidence were duly filed with the Clerk of the District Court of Pocahontas County, Iowa, on the 20th day of October, 1915, said transcript and shorthand notes and depositions being duly and properly certified to by the presiding Judge, and the Reporter, in accordance with law. And said certified notes were duly translated by E. R. Coffin, who was agreed upon by the parties to take the testimony, and the following certificate was by him attached to said depositions and evidence:

STATE OF IOWA,

Pocahontas County, ss:

I, E. R. Coffin, hereby certify that the above and foregoing deposition- of the above and foregoing named witnesses, that is Ed Carter, Fred Peterson, Ed Rathbun, Alex Peterson, Ed Korf, Fred Duitsman, C. F. Linnan, William Breiholz, P. S. Peiffer, John E. Jordan, J. W. Clancey, J. A. Moeller, J. L. Parsons, S. F. Hiatt, G. P. Smith, John Forbes, A. L. Thornton, S. F. Moeller, George W. Day, Louis O'Donnell, and Mr. Dooley, same being contained in two volumes, marked one and two, were duly taken down by me in short-
144 hand. That the extension of my shorthand notes of the depositions of said witnesses is and constitute- the foregoing depositions. I hereby certify and return that the taking of said depositions, that the respective parties to this controversy

did waive the necessity of the said witnesses, signing the shorthand notes and the signing of said notes extended into longhand.

I certify and return that the above and foregoing depositions correctly show each and every question asked of said witnesses by the respective parties hereto, and the same is and constitutes a full, true and complete transcript of the records in all the proceedings had in taking said depositions of the witnesses.

I further state that each of the witnesses were, prior to the taking of the depositions as aforesaid, duly sworn as by law provided and I further certify and return that the taking of the oath provided by the statute to be administered to the shorthand reporter was duly waived by the respective parties hereto.

I further certify that each and all of the exhibits referred to in the testimony of said witnesses were marked by their respective identification marks as shown on said exhibits and the same are now in the hands of George W. Day, Pocahontas, Iowa, being part of the depositions of said witnesses.

E. R. COFFIN.

Subscribed and sworn to before me this 26th day of May, 1915.

F. D. DAVIS,
Notary Public.

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Certificate of Counsel.

We hereby certify that the above and foregoing Abstract of the Record is a full, true and correct abstract of the record of the trial of this case. That it contains all the evidence offered and all the evidence introduced on the trial of the said cause, together with all objections, rulings and exceptions thereto, and fully sets forth the pleadings and exhibits and judgment entries and decree, and the appeal and all other matters which are of record in said cause, including all evidence taken, all pleadings filed, reference to all exhibits introduced properly identified, all rulings made, all objections made, and all exceptions taken.

T. F. LYNCH,
Attorney for Appellants.

We hereby certify that the actual cost of printing the foregoing abstract of record is in the sum of 65 cents per page.

T. F. LYNCH,
KENYON, KELLEHER, PRICE &
HANSON,
Attorneys for Appellants.

Notice of Oral Argument.

Notice is hereby given that counsel for appellants will ask to be heard orally in argument upon the final submission of this cause in the Supreme Court.

T. F. LYNCH,
KENYON, KELLEHER, PRICE &
HANSON,
Attorneys for Appellants.

In the Supreme Court of Iowa, May Term, 1919.

[Cut of Seal.]

WM. BREIHOLZ et al., Appellants,

vs.

BOARD OF SUPERVISORS et al., Defendants.

Cause No. 32531. In Equity.

Appeal from Pocahontas County District Court.

Honorable D. F. Coyle, Judge.

T. F. Lynch and Kenyon, Kelleher & Hanson, Attorneys for Appellants.

F. C. Gilchrist and Healy & Faville, Attorneys for Appellees.

Appellees' Additional Abstract.

Service of the within Additional Abstract is accepted this — day of May, 1919.

Attorney for Appellants.

147 The appellee deems the Abstract incorrect, and files this Additional Abstract accordingly, to correct the same.

The witness S. F. HATT testified in addition to what is shown in the Abstract as follows:

Other bidders were present (at the time of the letting to witness of the contract), and I think other bids were placed with the Board. The work is more expensive in a clean-out, as the yardage is smaller per hundred feet, and it is shallow.

And concerning the use of dynamite on the clean-out, this witness testified: We used a half a dozen shots of dynamite. Probably only five or six yards of original dirt was removed by this in Branch A. We used one or two shots on Mercer's land, and this loosened probably four or five yards of dirt. Dynamite used in the fall was for the purpose of loosening the dirt washed in or the frozen dirt—to break the crust. With the exception of the two times when we removed five or six yards of solid earth, generally speaking I will say that we did not clean out or remove dirt that had not been excavated or removed from the ditch at the time of the original construction.

There was not included in this \$10,500 (the sum of the warrants that had been issued to witness page 110 ab.) any cost for the removal or excavation of any dirt which was not required to be excavated under the construction instructions and cuts furnished by

Warrington, the engineer. The rotten banks break loose, and the water comes in and we have to throw it out. A ditch that is twenty feet wide washes until it is thirty and you throw it out and get pay for twenty.

Branch "A" had practically filled up when I started the clean-out. The lower part of the main ditch had filled in three and a half feet deep of silt. It was in bad shape and would not carry off the water or drain the land because it was filled. The tiles were submerged.

I did the digging in Calhoun county because it was an advantage to me and gave a good fall behind my machine as I went up stream. I did this for my own benefit and did not get pay for the yardage excavated there, and it was not included in the warrants issued to me. The outlet into Cedar Creek was 200 feet over into Calhoun county.

I left the culvert on the north side of the Busby land when I came back with the clean-out exactly as it was before the clean-out.

In case a different kind of machine had been used than mine they would have had to remove five bridges beside the railroad bridge. The Thomas bid was higher than mine.

Testifying concerning the width of Branch "A" (page 112 Ab.) witness stated (lines 14 and 15) that the original bottom width was four feet "by what the profile was, but it was made wider than that." And at lines 20 and 21 (page 112) witness said that he went on conditions of the ditch regardless of the cuts "as there are certain places in the ditch that the banks cave and we take out all that fills—all required to come out."

I probably read the report Warrington had filed. He told me that it was all filled up. The yardage I claim in Branch A is not yardage that was not contemplated when the contract was made.

I figured that if I did not get pay for what I did they would have a good ditch anyway (line 30, p. 115). I told the engineer that I went there (the bottom 200 feet in Calhoun county) for my own benefit. Ditch 29 did not go to the line.

At the time of the bidding witness did not testify as stated in lines 11 and 12 p. 118 but did state that there was quite a crowd present at the letting, could not say just who was there. I had been to many lettings and saw many bidders and did not pay attention.

The work I did was reasonably necessary to keep the ditches repaired and from falling away and from filling up. I gave a bond to secure Exhibit X (contract).

The word "not" should be stricken from line 19 on page 119. I can tell mighty close as to whether the engineer is treating me fairly or not. I did not dig Branch "A" deeper than it had been originally on the north of the Busby place. When I got thru with the clean-out work the branch and the main was not any wider than immediately after the original construction except where it caved in and where sand and wash-outs—such as that.

149 On page 82 lines 6 and 7 the witness Hiatt was asked "How much deeper did you dig than the original," and he replied "Now do you mean the grade line—whether we went below grade line" and then said "Well if we went deeper than the grade line we probably went a foot below." "We dug to the grade line the engineer

gave us. Do not think there was much difference between the original grade line and the grade line he gave us."

On page 82 line 28 the witness said "That was caused in that particular case because we were going to lower the grade line." And at line 32 page 82 he testified that there would be very little dirt removed for the first time under the clean-out (second contract), very little except what come under the "first" specifications of the ditch—just possibly what was dynamited—we dynamited for probably fifty feet.

In speaking of the silt removed (page 84 line 3) he said, "It averaged, I think, more than a foot, to make an estimate it would be three and a half feet."

The witness J. A. MOELLER stated on cross-examination page 86 line 21 et seq. as follows: "I never offered any Board of Supervisors to take a contract as they offered it to the public, and I am never going to if they don't come to my ideas. My bids are always offered on the basis of being figured according to Moeller Brothers' table of over-cuts. The time they accepted one of my bids they got into a dispute about what I meant."

And at line 14 page 87 there seems to have been very poor abstracting inasmuch as the witness testified that the yardage referred to was about 4,000 or 5,000 yards in the lower and 15,000 yards above of absolute new construction. We got 20.24 for the whole job about three-fourths of a mile long. I don't know whether Horton & Mosely had their dredge on the ditch right at the place the work was to commence.

The witness G. P. SMITH, Drainage Engineer, testified: It would be necessary in order to preserve the drainage of the lands in the district to keep the mains open. I would not consider thirty cents as an excessive price for this work.

The cost of Branch "B" served by the plaintiffs had been 150 originally reduced. All of plaintiffs except one are on Branch B, and this branch was not assessed enough in the original assessment to pay its own cost. It lacked \$1,250.00 of paying for itself. Branch B under the Skeels assessment did not help to pay any part of the main. They could not have outletted Branch B without first building the main. It was necessary for Branch B. The lands tributary to the lower main were assessed \$27,223.00, whereas they should have been assessed only some \$16,000.00.

With regard to the over-payment to the Katz-Craig Contracting Company spoken of in the pleadings and the record it was stipulated on the trial that the Board of Supervisors, acting for the district, had instituted a suit for the recovery of this over-payment and that said action had been prosecuted to judgment for the over-payment and interest from which an appeal was then pending in the Supreme Court of Iowa. (See now County of Pocahontas vs. Katz-Craig Company 181 Iowa, 1313.)

Certificate.

I hereby certify that the foregoing is a true and correct Additional Abstract of the record in this case and that the actual cost of printing it was the sum of \$6.75.

F. C. GILCHRIST,
Attorney for Appellees.

151

In the Supreme Court, May Term, 1919.

569—32531.

WILLIAM BREIHZOL and Others, Appellants,

vs.

BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA, and Others,
Appellees.

Appeal from Pocahontas District Court.

D. F. Coyle, Judge.

July 10, 1919.

Action in Equity for the Cancellation of Assessments Levied upon the Lands of the Plaintiffs for the Alleged Expense or Cost of Maintenance, Cleaning and Repairing Certain Drainage Ditches.

On trial the District court dismissed the bill and plaintiffs appeal. Affirmed.

T. F. Lynch and Kenyon, Kelleher and Hanson, for appellant.
F. C. Gilchrist and Healy and Faville, for appellees.

WEAVER, J.:

Much is said in the pleadings that is not necessary to an understanding of the issues in this case. Briefly state, it is conceded or shown without controversy that in the year 1907, a Drainage District, known as "No. 29" was established in Pocahontas County and the district was improved by the construction of a drainage system composed of a certain main with other laterals or branches. While some of these drains were of the closed or tile pattern, a large proportion thereof was open. In the year 1910, the engineer in charge of the district reported to the board of supervisors that a certain portion of the open main ditch, and one or more of the branches, had become filled with silt or sediment to an extent making it necessary or proper to clean the obstructed channels. He estimated the necessary excavation at 5500 yards. Nothing seems to have been done with reference to this report during
152 that year or until March, 1911, when the engineer brought up the subject anew, but this time recommending a more

extensive cleaning and repairing of the open ditches in the district and estimating the entire excavation at about 4500 cubic yards. Acting on this report and approving it, the board voted to employ S. F. Hiatt to do the work, being approximately 7317 yards at 30 cents in the upper part of the district, 36104 yards at 28 cents in the lower part and 936 yards in what is known as "Branch A." A contract to this effect was then made between the County Auditor and Hiatt. The letting of the contract was not advertised and was not offered for bids. Proceeding under the contract, Hiatt performed the work, and the cost or expense so incurred was, by order of the board, assessed against all the lands within the district in proportion to their assessment for the original construction of the system. The plaintiffs own tracts of land affected by this assessment and bring this action to have the same adjudged invalid and the lien thereof vacated and removed.

Hiatt was made a defendant and by proper pleading he asked that his right to the agreed compensation be confirmed. The theory upon which plaintiffs demand relief is that, the work actually contracted for and performed was not in any proper sense of the term, a work of repair upon the existing system, but rather in the nature of an original or independent improvement which the supervisors could not lawfully establish or order except upon notice to the property owners, nor lawfully contract for its construction except upon due advertisement and upon competitive bids.

And this, in brief, is what we understand to be the central proposition upon which the result of this litigation turns.

The trial court after hearing the evidence, entered a decree adjudging the equities to be with defendants; that the board of supervisors had complied with the law in letting the contract to Hiatt, and that Hiatt had performed his part of the agreement and was entitled to a compliance with such contract on part of the board of supervisors and County Auditor.

To ascertain the nature of the work contemplated, we turn to the written contract entered into with Hiatt and find it there recited that he agreed "to deepen, clean, reopen and repair said Drainage District No. 29 from Station Zero to Station 37 in the manner and to the proportionate depth and width as specified in the report of W. B. Warrington filed March 11, 1911; and from Station 37 to Station 87; from Station 87 to Station 170; from Station 170 to Station 250, the above approximating about 35168 yards herein called the lower end of said district; also in addition to the above work in the lower end of the district, the second party agrees to clean, reopen and repair Branch A from Station Zero to Station 23—approximating 936 cubic yards—and to clean, reopen, deepen and repair said drainage improvement from Station 402 to Station 500, approximating about 7317 cubic yards and herein called the upper end of said district." Other provisions of the writing relate to matters of detail not bearing materially upon the issues in the case.

The engineers report and recommendation upon which the board acted in letting the contract does not appear to be em-

bodied in the record and the engineer making it being since deceased, we do not have the advantage of his testimony, but it may be presumed that the contract as made with Hiatt is in substantial accord with such recommendation. The work was done under the supervision of the county's engineer and the testimony tends to show that in so doing, the contractor not only took out the sediment with which the ditches had, to a greater or less extent, become filled or obstructed, but, under the direction of the engineer or in pursuance of the plans furnished by him, the contractor also, in certain places, increased the depth of the excavation below its original grade and in other places sought to insure greater permanency of the banks of the ditch by increasing their slope and to that extent increased the original width of the channel. There is also evidence of some original excavation at the outlet.

It further appears that the contractor extended an excavation beyond the district limits a short distance in order to facilitate the successful operation of the drainage system, but for this work
154 he testifies he neither asked nor received compensation and his statement does not appear to be disputed.

The witnesses generally agree that the ditches had become filled and obstructed to a degree rendering it necessary or at least appropriate that they should be cleaned out and repaired if they were to be of real benefit to the lands of the district, and it is also reasonably certain that when this work was completed, the ditches were in part, at least, somewhat deeper and wider than they were as originally constructed. No witness undertakes to say that the work done was uncalled for, or did not constitute a substantial betterment of the drainage system, but there is some evidence to the effect that the compensation to the contractor, as fixed in the agreement, was in excess of its fair value. The charge in the plaintiff's petition and repeated in argument that the work contracted for and done included a lengthening or extension of the ditch or ditches beyond their original dimensions is not justified by the record, but as we have said it is to be conceded that the channels were not only reopened, cleaned and emptied of silt and obstructions, but were in part, to some extent, materially deepened.

Such being in part the nature of the work contracted for and done, the material legal inquiry is whether under the provisions of the statute, the board was authorized to undertake it without notice to the property owners, or to let the contract except upon competitive bidding.

If we will bear in mind that this work here done was in a drainage district, the organization of which had been perfected for several years and that the drainage improvements contemplated in such organization had been fully completed long before the extension of this contract to reopen, clean and deepen the ditches, there need be no doubt or confusion as to the effect of the statute. The misunderstanding which seems to have existed concerning the provisions of Code Supplement, sections 1989-a11 and 1989-a21 and to which perhaps a decision or two by this court has contributed, has arisen

by failure to notice the distinction between the conditions
155 calling for their application.

The first of these sections, 1989-a11, prescribing the procedure to be followed when after the establishment of the district, "and before the completion of the drainage improvement therein," it becomes apparent that a levee or drain should be enlarged, deepened, or otherwise changed, the board may authorize such change by resolution, subject to the provision that if such change operates to increase the burden upon any property, notice of the proposed alteration shall be given the owner or owners so affected an opportunity afforded them to present their claims for damages.

But by the other section, 1989-a21, provision is made for the maintenance and care of the drainage system after the "district shall have been established and the improvement constructed." For that purpose it is there provided that the improvement "shall at all times be under the control and supervision of the board of supervisors and it shall be the duty of the board to keep the same in repair" and for that purpose "they may cause the same to be enlarged, reopened, deepened, widened, straightened, or lengthened for a better outlet." The cost of such repairs and changes are to be paid from the drainage fund of the district or by assessing it upon the lands in the same proportion that the cost of the original construction was assessed—except where additional right of way is taken and in such case the board must proceed as the statute provides for establishing an original improvement.

The reason for the distinction made by these sections is quite obvious. The first prevents any undue advantage being acquired over the property owners in the establishment of a district by laying out a plan of improvement to which they may be willing to accede and for which they may claim little or no damage and then, by a mere resolution of the board, increase their burden by adopting a materially different plan to which they have had no opportunity to object. A very different situation is presented, however, where a district has been fully organized and a system of drainage has been established and completed.

156 In the nature of things and especially with open ditches having but slight natural slopes or grades, the duty should rest upon some responsible officer or board to see that they are kept open and in repair, and if they do not work efficiently, to cause the removal of the difficulty, if practicable.

This responsibility, section 1989-a21 places upon the board of supervisors. The duty is one which is continuous, calling for supervision from day to day and month to month, or, in the language of the statute, "at all times." The work to be done may involve considerable expense or it may be a succession of petty repairs each of which is comparatively inexpensive. To require that in each case the board must advertise the job and seek the lowest bidder would be to hamper and prevent its efficient action without any corresponding benefit to the public. It is not at all strange that a drainage system once completed and put to practical use should develop here and there a defect, and if such defect can be remedied or the

efficiency of the system be increased by lowering the bottom of the channel at some point or by widening the cut in another place the right of the board to which the duty of care and maintenance is committed, to do what ought to be done to that end, ought not to be unreasonably restricted.

The contract between the board and Hiatt to which the plaintiffs object, appears to be fairly and clearly within the scope of the power and responsibility conferred by this section. Even if the terms of the contract be as broad and comprehensive as plaintiffs say they are, they are still not in excess of the authority expressly given to "enlarge, reopen, deepen, widen and straighten" the completed ditches for the purpose of keeping them in repair and maintaining them in efficient working order. The statute imposes no duty to give notice in advance of each separate work of repair, or to advertise the same for competitive bids—except, perhaps, as may be implied in the proviso at the end of the section which seems to recognize such necessity where additional right of way is to be taken and this reservation is sufficient, in our judgment, to obviate any possible objection on constitutional grounds.

Appellants place chief reliance upon the decision by the court in *Lade v. Board*, 166 N. W. 586, and in candor we must say that if we are to construe some of the language there employed according to its literal terms, as a statement of the law as it now exists, it is out of harmony with the views hereinbefore expressed. For example the opinion in the cited case says that, "While it is true the board of supervisors has the authority to have an existing ditch widened and deepened, and make the assessment for the cost thereof, this may only be done if notice be given, and none was given. See Code Supplement, section 1989-a11 as amended by section 10, chapter 118, 33 G. A., and section 4 of chapter 87, 34 G. A."

Now if the assessment which was there under consideration were made while the amendment provided by section 10 of chapter 118, 33 G. A., was in force the statement as to the effect of such amendment to invalidate that assessment need not be questioned, but by a later amendment which is embodied in the present Code Supplement of 1913 the section referred to, 1989-a11, is expressly limited to changes sought to be effected in the dimensions and location of the ditch after the district is established "and before the completion of the drainage improvements therein," and does not in any manner supersede Code Supplement, section 1989-a21, or limit or control the authority which that section vests in the supervisors.

Complaint is further made that all of the lands in the district were not benefited alike or in the same proportion and the assessments are therefore inequitable. There is no merit in the objection. The drainage system once established and completed is an improvement from which the district as a whole is conclusively presumed to receive a benefit and the statute expressly provides for the manner of the assessment of the expense of repair and the law in this respect appears to have been followed. A public school house, for example, may be of greater actual benefit to some property owners than to others, but the expenses for its construction, maintenance and re-

158 pair are chargeable in equal proportion to all the property within the district boundaries

Nothing here said in any manner detracts from the right of the owner of property within the drainage district to object to an assessment for a new and independent drainage improvement which is sought to be imposed under the guise of a mere work of repair such as is authorized by section 1989-a21. That subject we have recently treated in the case of C. & N. W. Ry. Co. v. Harrison Co., decided at the May period of the present term of court and need not here be further dwelt upon.

The conclusions we have announced appear to us to be inevitable unless we are to judicially neutralize the plainly expressed will of the legislature. The decision of the trial court is therefore—

Affirmed.

Ladd, C. J., Gaynor and Stevens, JJ., concur.

159 Be it remembered that on the 10th day of July, 1919, the following proceedings were had in the Supreme Court of Iowa, to-wit:

WILLIAM BREIHOLZ et al., Appellants,

vs.

BOARD OF SUPERVISORS OF POCAHONTAS COUNTY et al.

Appeal from Pocahontas District Court.

In this cause, the Court being fully advised in the premises, file their written opinion affirming the judgment of the District Court.

It is therefore considered by the Court that the judgment of the Court below be and it is hereby Affirmed, and that a writ of procedendo issue accordingly.

It is further considered by the Court that the Appellant pay the costs of this appeal, taxed at \$20.45 and that execution issue therefor.

I hereby certify that the foregoing is a full, true and complete copy of the judgment entry of said Court in the above entitled cause, as full, true and complete as the same remains on file and of record in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the Seal of said Court this 7th day of October, A. D. 1919.

[Seal of the Supreme Court of Iowa.]

B. W. GARRETT,
Clerk Supreme Court,

By _____, Deputy.

160

In the Supreme Court of Iowa.

WILLIAM BREIHOLZ, EDWARD KORF, JOSEPH STUART, MARY DOYLE,
 Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan,
 Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duits-
 man, J. M. De Vault, Appellants,

vs.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA, W. P.
 Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klien,
 Members of the Board of Supervisors of Pocahontas County, Iowa;
 L. O'Donnell, as Auditor of Pocahontas County; John Forbes,
 County Treasurer of Pocahontas County, Iowa; S. F. Hiatt, and
 the Katz-Craig Contracting Company, Drainage District Number
 Twenty-nine (29), Pocahontas County, Iowa, Appellees.

Petition for Allowance of Writ of Error.

To the Honorable Scott M. Ladd, Chief Justice of the Supreme Court
 of Iowa:

Now come William Breiholz, Edward Korf, Joseph Stuart, Mary
 Doyle, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan,
 Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitsman,
 J. M. De Vault, the above named plaintiffs and appellants, by their
 attorneys, Kelleher, Hanson & Mitchell, and complain and allege
 that they are land owners, owning land located in Pocahontas County,
 Iowa. That in the above entitled matter, on July the 10th, 1919,
 final judgment was rendered against your petitioners by the Supreme
 Court of the State of Iowa, that being the highest court of law or
 equity in the said state of Iowa, wherein it was adjudged that a
 judgment, theretofore rendered in favor of the defendants and against
 the plaintiffs in this cause by the District Court of Pocahontas County,
 Iowa, should be affirmed.

That, as is more fully shown by the record in this cause in
 161 which said judgment of the Supreme Court of Iowa was rendered,
 there was duly established in 1907 what was known
 as Drainage District Number Twenty-nine (29), Pocahontas County,
 Iowa. That subsequently, and on or about June 8, 1911, the Board
 of Supervisors of Pocahontas County, Iowa, by resolution entered
 of record, ordered and authorized certain repairs and changes of
 the ditches constructed in said Drainage District Number Twenty-
 nine (29). That on or about June the 9th, 1911, the Board of
 Supervisors of Pocahontas County, Iowa, entered into a contract
 with the defendant, S. F. Hiatt, whereby the said Hiatt agreed to
 deepen, clean, re-open and repair certain parts of said Drainage
 District Number Twenty-nine (29) for the agreed sum of Eleven
 Thousand Dollars (\$11,000.00). That the plaintiffs had no knowl-
 edge of the action of the Board of Supervisors in passing said resolu-

tion and in making said contract, nor were they ever served with any notice of such action or afforded an opportunity to be heard on the matters involved in said resolution and contract. That no notice was ever given inviting bids on the work contemplated by the resolution and that the contract was not let to the lowest bidder, but was awarded to and entered into with the said Hiatt without notice, at an exorbitant and unconscionable amount and rate of compensation. That the said Hiatt thereupon proceeded to enlarge and change, by deepening, widening and lengthening the ditches and drains in said Drainage District Number Twenty-nine (29), beyond the original plans and specifications, and that the plaintiffs, land owners of said district, had neither notice nor knowledge thereof until after the construction of the same. That warrants were issued by the county auditor to the contractor, Hiatt, in payment of the work, and that the assessments were levied against the lands of the plaintiffs, and, not being paid, went to bond. That the improvements, as made, 162 did not benefit the lands of the plaintiffs. That the plaintiffs are deprived, by reason of the assessment which is a lien on their land, of their property without due process of law, contrary to the constitution of the United States, and in particular, contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States. And, furthermore, that Section 1989-a-21 of the 1897 Code of Iowa, as amended, was in contravention of, and in violation of, the Fifth and Fourteenth Amendment to the Constitution of the United States.

Whereupon, it was adjudged by the Supreme Court of Iowa, in its final judgment in the above entitled matter, that the contractor did increase the depth of the excavation below its original grade, and increased the slope of the banks and increased the original widths of the channel and made an original excavation at the outlet, which extended the excavation beyond the limits of the original drainage district.

It was also adjudged by the said Supreme Court of Iowa, in its final judgment in the above entitled matter, that code section 1989-a-21 governed the procedure in this cause and that a Board of Supervisors, under and by virtue of said section, had the right to cause the drains of an existing drainage district to be enlarged, re-opened, deepened, widened, straightened, or lengthened for a better outlet, without giving land owners notice of the action, and that a Board of Supervisors had the right, under said statute, to let said contract without competitive bids and that Code Section 1989-a-11, which provided for notice of the proposed alterations in a drainage district wherein it was proposed to enlarge, deepen or otherwise change the ditches of drain, had no application. It was also adjudged by the said Supreme Court of the State of Iowa, in its final judgment in the above entitled matter, that the said Code Section 1989-a-21 did not violate any of the provisions of the Constitution of the United States.

163 Your petitioners further show that the said judgment of said Supreme Court of Iowa was, and is, a final judgment of

the highest Court of the State of Iowa in which a decision in said suit could or can be had. That the said original judgment was rendered and was filed in the Supreme Court of Iowa on July 10, 1919.

Petitioners further show that the said judgment is repugnant to and in violation of the Constitution and laws of the United States, and particularly to Article Fourteen to the Constitution of the United States, which provides that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law;" and to Article Five of the Amendments of the Constitution of the United States, providing that: "No person shall be * * * deprived of * * * property, without due process of law; nor shall private property be taken for public use without just compensation."

And a Federal question was made in said cause, to-wit, as hereinbefore set out, and that said judgment of the said Supreme Court of Iowa adjudges and determines that in a case wherein a drainage district has been established, that a Board of Supervisors, acting for and in behalf of such drainage district, may, without notice of any kind or character to an owner of lands within said drainage district, let a contract for the deepening, widening, straightening, lengthening, enlarging or re-opening of drains in said drainage district, and assess the cost thereof on the lands within the district on the basis of the original assessment for the construction of the drainage district, and without notice of either the intention to let the contract, the letting of the contract, or of the assessment to be levied to pay
 164 for the cost of such additional improvement to the original improvement; that a Board of Supervisors is authorized so to do under and by virtue of the Code of Iowa, Section 1989-a-21, and that such section governs and that that section does not contravene or violate the constitutional provisions of the Constitution of Iowa and the Constitution of the United States; that Code Section 1989-a-11, which provides for notice and which states that: "whenever any change or changes are made under this said section 1989-a-21, or any other section of the chapter (said Section 1989-a-21, being one of the sections) notice shall be given," does not apply. That the said judgment and decision presents the Federal Question of the right of a Board of Supervisors to enlarge, re-open, deepen, widen, straighten, or lengthen an existing drainage ditch without notice of any kind or character to the land owners affected thereby, and the Federal question of the right of a Board of Supervisors to levy an assessment of such work without notice of any kind to the land owners affected thereby. That said decision of said Federal questions was necessary to the judgment rendered by the Supreme Court of the State of Iowa.

Wherefore, your petitioner — present an exemplified copy of the record of the Supreme Court of Iowa, and pray that a Writ of Error to the said Supreme Court of Iowa may be allowed; that Citation be granted and Writ of Error may — operated as a supersedeas, that the errors complained of may be reviewed in the Supreme Court of the

United States, and judgment aforesaid, in said Supreme Court of Iowa, be reversed.

165 WILLIAM BREIHOLZ, EDWARD KORF, JOSEPH STUART, MARY DOYLE, ALEX. PETERSON, J. W. CLANCEY, P. E. PEIFFER, JOHN E. JORDAN, CHARLES F. LINNAN, HENRY SMITH, GARLIES TWEEDALE, FRED DUITSMAN, J. M. DE VAUL,

By KELLEHER, HANSON & MITCHELL,
Their Attorneys.

DENIS M. KELLEHER,
CLARENCE M. HANSON,
RICHARD F. MITCHELL,
Counsel.

The Writ of Error, as prayed for in the foregoing petition, is hereby allowed this 3rd day of October, A. D. 1919, the Writ of Error to operate as a supersedeas, and the Bond for that purpose is fixed in the penal sum of One Thousand Dollars (\$1,000.00).

SCOTT M. LADD,
Chief Justice of the Supreme Court of Iowa.

166 [Endorsed:] Causes No. 4130 and 4152. Equity. Petition for Allowance of Writ of Errors.

167 In the Supreme Court of Iowa.

WILLIAM BREIHOLZ, EDWARD KORF, JOSEPH STUART, MARY DOYLE, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitman, J. M. Devaul, Plaintiffs and Appellants,

vs.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA; W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klein, Members of the Board of Supervisors of Pocahontas County, Iowa; L. O'Donnel, as Auditor of Pocahontas County, Iowa; John Forbes, County Treasurer of Pocahontas County, Iowa; S. F. Hiatt, and the Katz-Craig Contracting Company, Drainage District Number Twenty-nine (29), Pocahontas County, Iowa, Defendants and Appellees.

Assignment of Error.

Now come the plaintiffs and appellants and make and file this, their assignment of error:

1. Section 1989-a-21, of the Code of Iowa in so far as it attempts to clothe the Board of Supervisors with ex parte power and authority to enlarge, by widening, deepening and lengthening a ditch therefore constructed, is unconstitutional and void by reason of its failure to provide some kind of notice to those who are required, by

statute, to defray the expense of the improvement, or afford an opportunity, at some state of the proceedings, to be heard upon all questions necessary to be determined in order to justify the proposed work, and the Supreme Court of Iowa, in failing to so hold and adjudge, committed manifest error.

168 2. The Supreme Court of Iowa, in holding and adjudging that no notice was requisite in proceedings had under section 1989-a-21 of the Code of Iowa, erred in holding and adjudging that said section was not unconstitutional and void as depriving those against whom assessments are made of their property without due process of law.

3. The statute, Section 1989-a-21 of the Code of Iowa, is not limited to mere ordinary repairs of an existing ditch. It not only authorizes repairs, but grants to a Board of Supervisors the further power to enlarge the ditch by widening its bank or deepening its channel, and, respecting this additional power, it contains no limitation respecting the extent to which the board may go. The Supreme Court of Iowa, therefore, in holding that section 1989-a-11 of the Code was not to be read in connection with section 1989-a-21, so as to require notice under section 1989-a-21, erred in holding and adjudging that said section 1989-a-21 was not unconstitutional and void.

4. In as much as section 1989-a-21 of the Code, as construed by the Supreme Court of Iowa, does not require notice, and authorizes and empowers a Board of Supervisors to enlarge a previously constructed ditch by widening its banks and deepening its channel and even extending the ditch beyond its original construction, it is unconstitutional and void, for the reason that it contains no provision for notice to interested parties or otherwise affords them an opportunity to be heard, and the Supreme Court of Iowa, in not so holding, committed manifest error.

5. Code Section 1989-a-21, as administered and construed by the Supreme Court of Iowa, directly violates and infringes the provisions of the Constitution of the United States in that the Supreme Court of Iowa holds and adjudges that no notice need be given to interested landowners of a deepening, widening and lengthening of an existing drainage ditch, and that an assessment may be
169 levied to defray the costs thereof without notice or an opportunity to be heard, and by reason thereof the Supreme Court of Iowa committed manifest error in so adjudicating the claims of the plaintiffs.

6. The Board of Supervisors were without power to make a contract for the purpose of deepening, widening, lengthening, enlarging and repairing of a ditch which had already been constructed, and to assess the cost thereof against the land owners within the district, without giving notice, and the Supreme Court of Iowa, in holding and adjudging to the contrary, committed manifest error for the reason that the land owners were deprived of their property

without due process of law, contrary to Articles 5 and 14 of the Constitution of the United States.

7. The work done under the contract in this case was not a mere cleaning and repairing, but was widening of the banks and a deepening of the channel of the existing drainage ditch and therefore of a character requiring notice to be given to the land owners affected, and no notice having been given, the land owners were deprived of their property without due process of law. And the Supreme Court of Iowa committed manifest error in holding that the land owners were not entitled to a hearing or notice of the letting of the contract and of the assessment made thereunder.

8. The levy of the assessment against the lands of the plaintiffs, to pay for the construction of the work provided for in the contract, was void, and the county treasurer, in attempting to sell the lands of the plaintiffs for delinquent taxes, was without authority so to do, and the Supreme Court of the State of Iowa, in adjudging to the contrary, committed manifest error to the prejudice and rights of the plaintiffs, under and by virtue of the Constitution of the United States.

170 9. The tax and assessment, as levied by the Board of Supervisors of Pocahontas County, Iowa, and spread upon the tax records, is void and should have been ordered cancelled, and the collection thereof enjoined for want of any notice, and for failure to afford the tax payer an opportunity for hearing upon the question of subjecting his property to such tax and assessment, the same being levied and assessed for a substantially and materially altered, widened, deepened and enlarged drainage improvement, without due process of law, and contrary to Articles Five and Fourteen of the Constitution of the United States. And the Supreme Court of Iowa, in so failing to hold and to reverse the action of the trial court, committed manifest error.

10. Section 1989-a-21, as administered and justified by the Supreme Court of the State of Iowa, is unconstitutional and void for the reason it affords to interested land owners no opportunity whatsoever to file claims for damages. And the Supreme Court of the State of Iowa, in not so holding, committed manifest error.

11. Section 1989-a-21, as construed, administered and applied by the Supreme Court of Iowa, does not provide an opportunity to land owners affected, to file objections to assessments levied against their lands, and, by reason thereof, contravenes the provisions of Articles Five and Fourteen of the Constitution of the United States. And the Supreme Court of the State of Iowa, in not so holding, committed manifest error.

12. Section 1989-a-21, as construed, administered and applied by the Supreme Court of the State of Iowa, fails to provide for any right of appeal to the interested land owners, and, by reason thereof, violates Articles Five and Fourteen of the Constitution of the United States. And the Supreme Court of Iowa, in not so holding, committed manifest error.

171 13. The assessment for the original construction of Drainage District Number Twenty-nine (29), having been levied as a unit and spread over the district without reference to the benefit received, contrary to the Statutes of Iowa, and the same method and classification having been used in spreading the assessment for the work done under the contract complained of, there was, by reason thereof, a taking of property without reference to the benefits received and without due process of law, and contrary to the Constitution of the United States. And the Supreme Court of the State of Iowa, in not so holding, committed manifest error.

14. The Board of Supervisors of Pocahontas County, Iowa, having levied an assessment to cover the cost of construction under the Hiatt contract, and which assessment was for work of construction done outside of Pocahontas County, as well as within Pocahontas County, Iowa, the assessment was void for want of jurisdiction, and the Board of Supervisors, in levying the assessment to pay for work, some of which was work done outside of the territorial limits of the county, therefore violated the Constitution of the United States. And the Supreme Court of the State of Iowa, in not so holding, committed manifest error.

DENNIS M. KELLEHER,
CLARENCE M. HANSON,
RICHARD F. MITCHELL,
Attorneys for Plaintiffs in Error.

KELLEHER, HANSON & MITCHELL,
Of Counsel.

Duly filed with petition for writ of error, this 3d day of October, A. D., 1919.

SCOTT M. LADD,
Chief Justice of Supreme Court of Iowa.

172 In the Supreme Court of Iowa.

WILLIAM BREIHOLZ, EDWARD KORF, JOSEPH STUART, MARY DOYLE, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitsman and J. M. De Vault, Plaintiffs and Appellants,

vs.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA; W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klein, Members of the Board of Supervisors of Pocahontas County, Iowa; L. O'Donnell, as Auditor of Pocahontas County, Iowa; John Forbes, County Treasurer of Pocahontas County, Iowa; S. F. Hiatt, and the Katz-Craig Contracting Company, Drainage District Number Twenty-nine (29), Pocahontas County, Iowa, Defendants and Appellees.

Order.

The above entitled matter coming on to be heard on this 3rd day of October A. D. 1919 upon the petition of the appellants therein for

a Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Iowa, and upon examination of said petition, and the record in said matter, and desiring to give the petitioners an opportunity to present in the Supreme Court of the United States the questions presented by the record in this matter

It is ordered that a Writ of Error be, and the same is hereby, allowed to this Court from the Supreme Court of the United States, and that the Bond presented by said petitioners be, and the same is hereby, approved.

SCOTT M. LADD,

Chief Justice of the Supreme Court of the State of Iowa.

173 [Endorsed:] In Equity. Causes Nos. 4130 and 4152.
William Breiholz et al. vs. The Board of Supervisors of Pocahontas County, Iowa, et al.

174 Know all men by these presents:

That we, William Breiholz, Edward Korf, Joseph Stuart, Mary Doyle, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitsman, J. M. De Vault, as principals, and United States Fidelity and Guaranty Company of Baltimore, Md., as surety, are held and firmly bound unto The Board of Supervisors of Pocahontas County, Iowa, W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klein, Members of the Board of Supervisors of Pocahontas County, Iowa; L. O'Donnell, as Auditor of Pocahontas County, Iowa, John Forbes, County Treasurer of Pocahontas County, Iowa; S. F. Hiatt, and Kratz-Craig Contracting Company, Drainage District Number Twenty-nine (29), Pocahontas County, Iowa, in the sum of One Thousand Dollars (\$1,000.00), to be paid to the said obligees, their successors, representatives and assigns, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators jointly and severally by these presents. Sealed with our seals and dated this 3rd day of October, A. D. 1919.

Whereas, lately at the May Term, A. D. 1919, of the Supreme Court of the State of Iowa, in a suit pending in said Court between William Breiholz, Edward Korf, Joseph Stuart, Mary Doyle, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitsman, J. M. De Vault, plaintiffs and appellants, and The Board of Supervisors of Pocahontas County, Iowa, W. P. Hopkins, J. A. Crummer, C. Nolan,

M. J. Dooley, and R. Klein, Members of the Board of Supervisors of Pocahontas County, Iowa; L. O'Donnell, as Auditor of Pocahontas County, Iowa; John Forbes, County Treasurer of Pocahontas County, Iowa; S. F. Hiatt, and the Katz-Craig Contracting Company, Drainage District Number Twenty-nine (29), Pocahontas County, Iowa, Defendants and Appellants, judgment was rendered against the said William Breiholz, Edward Korf, Joseph Stuart, Mary Doyle, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred

Duitsman, J. M. De Vault, Plaintiffs and Appellants, aforesaid, and the said plaintiffs having obtained a Writ of Error from the Supreme Court of the United States to reverse the judgment in the aforesaid suit, and a Citation directed to the said defendants, citing and admonishing them to appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, thirty (30) days from and after the date of said citation,

Now, the condition of the above obligations is such that if the said plaintiffs and appellants shall prosecute said writ to effect and answer all costs if it fails to make good said Writ of Error, then this obligation to be void, otherwise to remain in full force and effect.

Sealed and delivered in the presence of

WILLIAM BREIHOLZ,
EDWARD KORF,
JOSEPH STUART,
MARY DOYLE,
ALEX PETERSON,
J. W. CLANCEY,
P. E. PEIFFER,
JOHN E. JORDAN,
CHARLES F. LINNAN,
HENRY SMITH,
GARLIES TWEEDALE,
FRED DUTSMAN,
J. M. DE VAULT,

By KELLEHER, HANSON & MITCHELL,
By C. M. HANSON,

Their Attorneys.

UNITED STATES FIDELITY AND
GUARANTY COMPANY,

By R. G. WELLMAN,

Attorney in Fact.

[Seal United States Fidelity & Guaranty Company, Incorporated 1896.]

Approved by

SCOTT M. LADD,

Chief Justice of the Supreme Court of Iowa.

176 [Endorsed:] In Equity. Causes Nos. 4130 and 4152.
William Breiholz et al vs. The Board of Supervisors of Pocahontas County, Iowa, et al. Bond.

In the Supreme Court of Iowa.

WILLIAM BREIHZOLZ, EDWARD KORF, JOSEPH STUART, MARY DOYLE, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedle, Fred Duitsman, J. M. De Vault, Plaintiffs and Appellants,

VS.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA, W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klien, Members of the Board of Supervisors of Pocahontas County, Iowa; L. O'Donnell, as Auditor of Pocahontas County; John Forbes, County Treasurer of Pocahontas County, Iowa; S. F. Hiatt, and the Katz-Craig Contracting Company, Drainage District Number Twenty-nine (29), Pocahontas County, Iowa, Defendants and Appellants.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Iowa, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Iowa before you, or some of you, being the highest court of law or equity of said State in which a decision could be had in the said suit between William Breiholz, Edward Korf, Joseph Stuart, Mary Doyle, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedle, Fred Duitsman, J. M. De Vault, Plaintiffs and Appellants, vs.

178 The Board of Supervisors of Pocahontas County, Iowa, W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klien, Members of the Board of Supervisors of Pocahontas County, Iowa; L. O'Donnell, as Auditor of Pocahontas County, Iowa; John Forbes, County Treasurer of Pocahontas County, Iowa; S. F. Hiatt, and the Katz-Craig Contracting Company, Drainage District Number Twenty-nine (29), Pocahontas County, Iowa, Defendants and Appellants, in which suit the said William Breiholz, Edward Korf, Joseph Stuart, Mary Doyle, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitsman, J. M. De Vault, were the appellants, and The Board of Supervisors of Pocahontas County, Iowa, W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klien, Members of the Board of Supervisors of Pocahontas County, Iowa, L. O'Donnell, as Auditor of Pocahontas County, Iowa, John Forbes, County Treasurer of Pocahontas County, Iowa; S. F. Hiatt, and the Katz-Craig Contracting Company, Drainage District Number Twenty-nine (29), Pocahontas County, Iowa, were the appellees, wherein was drawn in question the validity of a treaty or statute or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an

authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute *or*, or commission held under the United States, and the decision is against the title, right, privilege or assumption specifically set up or claimed under such clause of the said Constitution, treaty, statute, commission *or* authority; a manifest error hath happened to the great damage of the said William Breiholz, Edward Korf, Joseph Stuart, Mary Doyle, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitsman, J. M. De Vault, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, *so* command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 3rd day of October, in the year of Our Lord, One Thousand Nine Hundred and Nineteen.

WM. C. McARTHUR,
*Clerk of the District Court of
 the United States for the
 Southern District of Iowa,*
 By LOUIS J. ADELMAN,
Deputy.

Allowed by

SCOTT M. LADD,
Chief Justice of the Supreme Court of Iowa.

180 [Endorsed:] In Equity. Causes No. 4130 and 4152. William Breiholz, et al., vs. The Board of Supervisors of Pocahontas County, Iowa, et al.

- 181 WILLIAM BREIHOLZ, EDWARD KOF, JOSEPH STUART, MARY DOYLE, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitsman, J. M. De Vault, Appellants,

VS.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA; W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klien, Members of the Board of Supervisors of Pocahontas County, Iowa; L. O'Donnell, as Auditor of Pocahontas County; John Forbes, County Treasurer of Pocahontas County, Iowa; S. F. Hiatt, and the Katz-Craig Contracting Company, Drainage District No. 29, Pocahontas County, Iowa., Appellees.

Præcipe.

To the Honorable B. W. Garrett, Clerk of the Supreme Court of Iowa:

You are hereby ordered in making up the transcript of the record in the above entitled cause to include the following portions of the record.

1. The appellants' abstract of record.
 2. The appellees' amendment to appellants' abstract of the record.
 3. The opinion and judgment of the Supreme Court of Iowa.
 4. Petition for writ of error and allowance.
 5. Assignment of errors including date of the filing of the same in the Supreme Court of Iowa.
 6. Allowance of the writ of error.
 7. Bond and approval thereof.
 8. Writ of error.
 9. Præcipe for record and service.
 10. Citations in error and service thereof.
 11. Certificate of the Clerk of the Supreme Court of Iowa to the said transcript.
- 182 12. Stipulation entered into with reference to the record.

KELLEHER, HANSON & MITCHELL,
Attorneys and Counsellors for
Plaintiffs and Appellants.

In the Supreme Court of Iowa.

WILLIAM BREIHZOLZ, EDWARD KORF, JOSEPH STUART, MARY DOYLE, Alex. Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitsman, J. M. De Vault, Plaintiffs and Appellants,

vs.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA; W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klien, Members of the Board of Supervisors of Pocahontas County, Iowa; L. O'Donnell, as Auditor of Pocahontas County, Iowa; John Forbes, County Treasurer of Pocahontas County, Iowa; S. F. Hiatt, and the Katz-Craig Contracting Company, Drainage District Number Twenty-nine (29), Pocahontas County, Iowa, Defendants and Appellees.

Citation.

UNITED STATES OF AMERICA, ss:

To the Board of Supervisors of Pocahontas County, Iowa, W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klein, Members of the Board of Supervisors of Pocahontas County, Iowa; L. O'Donnell, as Auditor of Pocahontas County, Iowa; John Forbes, County Treasurer of Pocahontas County, Iowa S. F. Hiatt, and the Katz-Craig Contracting Company, Drainage District Number Twenty-nine (29), Pocahontas County, Iowa; Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a Writ of Error filed in the Clerk's Office of the Supreme Court of the State of Iowa, wherein William Breiholz, Edward Korf, Joseph Stuart, Mary Doyle, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitsman, 184 and J. M. DeVaul, are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Scott M. Ladd, Chief Justice of the Supreme Court of Iowa, this 3rd day of October, in the year of Our Lord One Thousand Nine Hundred and Nineteen.

SCOTT M. LADD,
Chief Justice of the Supreme Court of Iowa.

185 Service of the within Citation accepted, and a true copy thereof received this 4th day of October, A. D. 1919.

F. C. GILCHRIST,

Counsel of Record for The Board of Supervisors of Pocahontas County, Iowa; W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klien, Members of the Board of Supervisors of Pocahontas County, Iowa; L. O'Donnell, as Auditor of Pocahontas County, Iowa; John Forbes, as Treasurer of Pocahontas County, Iowa; Drainage District Number Twenty-nine (29), Pocahontas County, Iowa.

ROBERT HEALY AND HEALY & TONILLER,
*Counsel of Record for the Defendants in Error,
S. F. Hiatt, and Katz-Craig Contracting Company.*

186 [Endorsed:] Equity Nos. 4130 and 4152. William Brei-
holz et al., vs. The Board of Supervisors of Pocahontas County,
Iowa et al. Citation. Filed Oct. 7, 1919. B. W. Garrett, Clerk
Supreme Court.

187 In the Supreme Court of Iowa.

WILLIAM BREIHOLZ, EDWARD KORF, JOSEPH STUART, MARY DOYLE,
Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan,
Charles F. Linnan, Henry Smith, Garlies Tweeddale, Fred Duits-
man, J. M. De Vault, Plaintiffs and Appellants,

vs.

THE BOARD OF SUPERVISORS OF POCAHONTAS COUNTY, IOWA; W. P.
Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klien,
Members of the Board of Supervisors of Pocahontas County, Iowa;
L. O'Donnell, as Auditor of Pocahontas County, Iowa; John
Forbes, County Treasurer of Pocahontas County, Iowa; S. F. Hiatt,
and the Katz-Craig Contracting Company, Drainage District Num-
ber Twenty-nine (29), Pocahontas County, Iowa, Defendants and
Appellees.

Stipulation.

The parties to this cause, by their attorneys of record, agree that the following portions of the record shall constitute the transcript of the record on the pending Writ of Error to the Supreme Court of the United States, to-wit:

1. This Stipulation.
2. The appellants' abstract of the record.
3. Appellees' amendment to appellants' abstract of the record.
4. The opinion and judgment of the Supreme Court of Iowa.
5. Petition for writ of error, and allowance.

6. The assignment of errors, including the date of filing the same in the Supreme Court of Iowa.

188 7. Allowance of writ of error.

8. Bond, and approval thereof.

9. Writ of error.

10. Præcipe for record, and service thereof.

11. Citations in error, and service thereof.

12. Certificate of the Clerk of the Supreme Court of Iowa to the said transcript.

The Clerk of the Supreme Court of Iowa is accordingly requested to transmit only the papers designated in this Stipulation.

KELLEHER, HANSON & MITCHELL,

*Attorneys and Counsellors of Record for
the Plaintiffs and Appellants.*

ROBERT HEALY,

*Attorneys and Counselors of Record for S. F. Hiatt
and Katz-Craig Contracting Company.*

F. C. GILCHRIST,

*Attorney and Counsel of Record for The Board of
Supervisors of Pocahontas County, Iowa; W. P.
Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley,
and R. Klien, Members of the Board of Super-
visors of Pocahontas County, Iowa; L. O'Donnell,
as Auditor of Pocahontas County; John Forbes,
County Treasurer of Pocahontas County, Iowa;
Drainage District Number Twenty-nine (29),
Pocahontas County, Iowa.*

189 [Endorsed:] Equity Numbers 4130 and 4152. William
Breiholz et al., vs. Board of Supervisors et al. Stipulation.

190 Supreme Court of the State of Iowa.

Office of the Clerk.

STATE OF IOWA, ss:

I, B. W. Garrett, Clerk of the Supreme Court of Iowa, do hereby certify that the attached and foregoing is a true, correct and complete copy of the record in the case of William Breiholz, Edward Korf, Joseph Stuart, Mary Doyle, Alex Peterson, J. W. Clancey, P. E. Peiffer, John E. Jordan, Charles F. Linnan, Henry Smith, Garlies Tweedale, Fred Duitsman, J. M. De Vault, Plaintiffs and Appellants, vs. The Board of Supervisors of Pocahontas County, Iowa; W. P. Hopkins, J. A. Crummer, C. Nolan, M. J. Dooley, and R. Klien, Members of the Board of Supervisors of Pocahontas County,

Iowa; L. O'Donnell, as Auditor of Pocahontas County, Iowa; John Forbes, County Treasurer of Pocahontas County, Iowa; S. F. Hiatt, and the Katz-Craig Contracting Company, Drainage District Number Twenty-nine (29), Pocahontas County, Iowa, Defendants and Appellees, as true, correct and complete as the same now remains on file in my office and as provided by the stipulation inclosed.

Done at Des Moines, Iowa, this 7th day of October, 1919.

B. W. GARRETT,
Clerk of the Supreme Court.

Endorsed on cover: File No. 27,342. Iowa Supreme Court. Term No. 587. William Breiholz, Edward Korf, Joseph Stuart et al., plaintiffs in error, vs. The Board of Supervisors of Pocahontas County, Iowa, et al. Filed November 3d, 1919. File No. 27,342.

